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ABSTRACT

Responding to a need expressed by New Mexico American Indian tribal leaders, this document defines and clarifies the status of reservations vis a vis the state's legal authority to impose tax. Divided into two major sections dealing with a current orientation to tax laws and the legal background upon which they are founded, this document also points out problem areas. Specifically, the document addresses: the present state of the law; the scope of tribal self-government; litigation as the least desirable method; tribal tax structure in relation to state; specific recommendations; principles and discussion; Federal control; tribal taxation of individuals; state tax of non-Indians within Indian lands; New Mexico's taxes; property tax; income tax; corporate taxes; license and Gross Receipt tax; use tax; severance tax; alcoholic beverage tax; cigarette tax; gasoline tax; inheritance tax; and motor vehicle registration. The appendices include: footnotes; statutes and laws; opinions and memoranda of the Department of Interior; selected bibliography; cases; New Mexico Constitution, Article XXI; Oil and Gas Severance Tax Act; Gross Receipt Regulation 3 (F) :9; New Mexico Statutes Annotated 1953 (revenue and taxation); Bureau of Revenue Rulings Number 69-110-2, 72-110-1, and 73-110-1. (JC)

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TAXATION

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INDIAN SOVEREIGNTY

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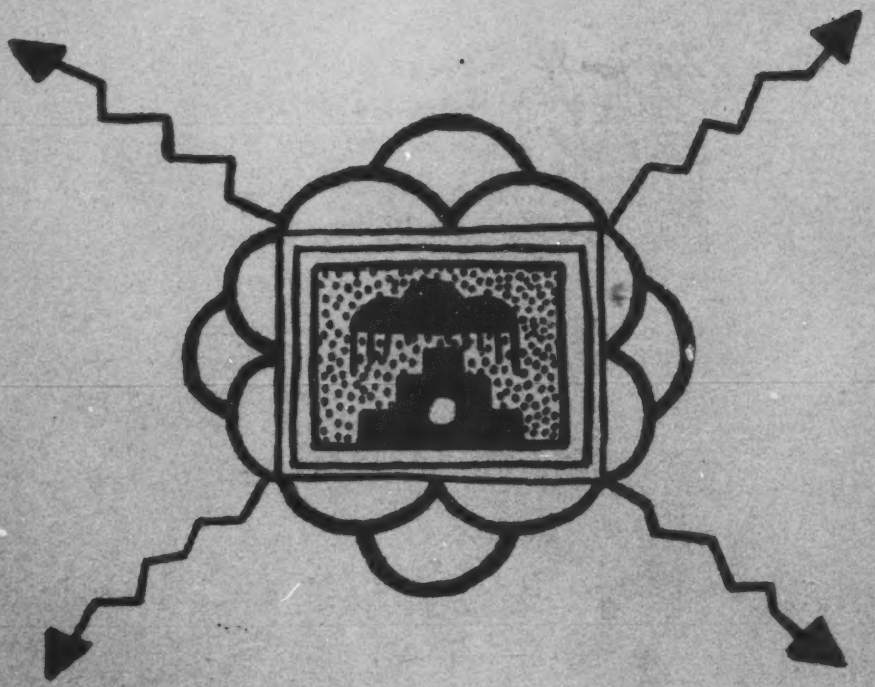

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New Mexico Commission on Indian Affairs

TAXATION

AND

INDIAN SOVEREIGNTY

A LOOK AT THE MATTER OF TAXATION

IN A STATE TRIBAL CONTEXT

A Study by The American Indian Law Center, University of New Mexico,
as authorized by The New Mexico Commission on Indian Affairs

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FOREWARD

As a result of contact with various tribal leaders, the New Mexico Commission on Indian Affairs was made aware of the need to make available to the tribes of the state information concerning the matter of taxation. The Commission staff was approached frequently by tribal leaders requesting information concerning the status of reservations vis-a-vis the state's legal authority to impose tax. This accelerated interest in the matter of taxation was, in part, a result of a report done by the South Dakota Task Force on Indian-State Government relations in late 1973. In the introduction to this study the authors state:

> Of the many important ways in which tribal governments and the state governments interact, perhaps none is more important than their relationship to each other as they seek to levy taxes on persons living within the boundaries of Indian country.

The Commission saw the need for a study of this kind and entered into an agreement with the Indian Law Center at the University of New Mexico to have such a study undertaken.

Our thanks go to all those who assisted in preparing this report. To Mr. P.S. Deloria, Director of the American Indian Law Center, and his staff including Fred Ragsdale, Phil Lujan and Joseph Little. To Jerry Cordova and Peter Hay of the Commission staff and to Dolores Chandler and Andreita Cordero for the final preparation of the manuscript.

Our thanks finally to the New Mexico Commission on Indian Affairs who saw the need for such a study and authorized its preparation.

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We earnestly hope that this study will open the door to further exploration of this vital area by all parties concerned.

Joe H. Herrera, Executive Director
April 4, 1975

PART I

INTRODUCTION

INTRODUCTION

For years the subject of taxation on Indian reservations has been an area of conflict between tribal and state governments. But Congress has never legislated specifically on the problem and federal policies and treaty provisions are far from clear, giving little guidance to either the courts or state and tribal governments by which to define tax relationship. "Friendly" litigation is time-consuming and costly for both sides and yields little in the way of definitive results.[1] Yet as the tribes participate more in the general economic life of the non-Indian society, the intergovernmental tax relationship will become increasingly important and complex.

This study of the tribal/state tax relationship has been commissioned by the New Mexico Commission on Indian Affairs to examine state and tribal jurisdiction to tax, to identify areas of intergovernmental conflict, and to recommend cooperative tribal/state action. The main body of the study discusses the problems in layman's terms; technical legal analysis and the case law are included in an appendix. The specific case law merely reflects the confusion and conflict and provides little guidance for solutions.

The American Indian Law Center has not tried in this study to arrive at a formulation of the tribal/state tax relationship which would satisfy both sides. Instead, it has attempted to define the problem in a way that will lead to fruitful discussions between state and tribal leaders and it recommends compromise, diplomacy and leadership on both sides.

SECTION I. - THE PRESENT STATE OF THE LAW

A. The Tribe's Power To Tax

As the law presently stands, the Indian tribes have broad authority to impose taxes on property and individuals within the reservation boundaries, but very few tribes have attempted to exercise their taxing power extensively and there are few judicial decisions on the subject.[2] Until recently, private economic activity within the borders of most reservations has been severely limited, consisting largely of federally-licensed traders, non-Indian lessees of Indian land, and Indian subsistence agriculture and crafts. None of these activities have been sources of general revenue for the tribal government. The federally-licensed traders have been presumed to be under exclusive federal control;[3] Indian subsistence activities cannot usefully be taxed; and the largest source of tribal income, the land lease, has accrued to the tribe as a landowner, not as a government.

Tribes have been largely unaware of both the need for and their ability to impose and collect taxes. Many public services have been provided on the reservation by the Federal Government and, in recent years, increasingly by the State Government.[4] Federal officials and tribal attorneys characteristically have been passive about encouraging the tribal councils to the positive exercise of governmental powers. Additionally, it has been an accepted principle of federal economic development policy for Indian reservations that tax advantages in the form of waivers of tribal taxation were necessary in order to attract development onto the reservations, although no corresponding federal tax benefits were provided. But the long-range economic problems of the reservations still await solving and it is clear that this "tax advantage principle" is only a theory which must now

be re-examined in light of present economic conditions and in light of the present needs of tribal government. Tribes may have been waiving their right to tax while receiving little in return.

The tribes recognize that a fair, efficient and effective tax structure is difficult to develop and administer. Many tribes presently lack the technical expertise to do so, and with the relatively small size of the reservations and their limited present economic activity, the cost of developing and administering a tax system will be very large in proportion to the revenue raised for the tribe. But the pressures of a developing economy are leading tribal governments to assume greater responsibilities in meeting the needs of an Indian society in the modern world.

B. The State's Power To Tax

1) Off-reservation: In Mescalero Apache Tribe v. Jones[5], the United States Supreme Court held that the state generally has the power to tax Indians off-reservation unless Congress has provided a specific exemption.

2) On-reservation (Indian): But the Supreme Court has also said as recently as McClanahan v. Arizona Tax Commission[6] that the state has no jurisdiction to tax Indians or Indian property on the reservation.

3) On-reservation (non-Indian): Under the test in Williams v. Lee[7], which was clarified in the McClanahan case, the state also cannot impose any on-reservation tax on non-Indians which would interfere with tribal self-government.[8]

Under these rules articulated by the U.S. Supreme Court, Indian (and Indian-connected) tax exemptions must fit into at least one of three categories, and everything not in these three categories is subject to

state tax on the same basis as other property or activities in the state. To find the content of these categories, one must:

Category A: Determine the specific statutory or treaty tax exemptions for Indians off-reservation; and

Category B: Determine who are Indians and what is Indian property on-reservation; and

Category C: Determine the scope of on-reservation tribal self-government as it affects non-Indians.

Category A and B seem clear enough to laymen, perhaps, but in fact they are clear only when the facts in issue fit the categories exactly. When the reservation society and economy were entirely separate from that of the surrounding state, the court-made rules might have provided handy guidelines for taxation. If the courts said the state could not tax an Indian cow, it was not difficult to guess that the state could probably not tax an Indian bull. But in the modern world of a more complex and integrated reservation economy, the rules are less helpful.

For example, when is a tax "on Indians"? Direct taxes collected from the Indians themselves on the reservation are prohibited by this rule, but is the substance of the rule fulfilled when indirect taxes are levied which impose a substantial burden on the Indians but are as a technical matter collected from non-Indians doing business directly with them? On the other hand, every tax is ultimately passed on to the final consumer. Does this mean that all taxes are prohibited by this rule where the final consumer is an Indian on the reservation? Obviously there must be a line drawn somewhere, but the question is where should the line be drawn?

In a healthy and varied reservation economy, the patterns of ownership of property and businesses will not be clearly broken down along

racial lines. Some kinds of property and business will be owned jointly by Indians and non-Indians, by tribal members and non-members, by the tribe itself and by Indian and non-Indian private entities. Although some courts appear to have held that Indian part-ownership is enough to qualify for the on-reservation Indian tax exemption, there will be a need for lines to be drawn here as well. What if, for example, the Indian has only 1% ownership, given for the sole purpose of qualifying an essentially non-Indian business for a tax exemption? Again, where should the line be drawn?

Similar definitional problems are presented by an enterprise which does business both on and off the reservation. For purposes of the tax exemption, what are the important considerations in determining whether the business is on or off the reservation? What if the business is jointly owned by Indians and non-Indians?

Where the facts concerning ownership and location for tax purposes do not fall easily into one of the above categories, it falls to the courts to determine whether a state tax may be imposed and collected. It must be admitted from the performance of state taxing authorities generally that unless a claimed exemption falls exactly into a category, the state will force the issue. But the courts have little in the way of guidance for new and more complex fact situations, and Congress has provided virtually no basic principles to define the intergovernmental relationship between the tribes and the states. The final result, then, of such litigation may be a rather arbitrary case-by-case determination in which the skill of the advocates is at least as important as the principles they are urging.

Although Categories A and B may be difficult to determine in a complex fact situation, Category C presents a separate set of problems all to itself.

SECTION II. - DETERMINING THE SCOPE OF TRIBAL SELF-GOVERNMENT AS IT AFFECTS NON-INDIANS ON THE RESERVATION

A. The General Problem

The state cannot impose a tax on non-Indians on the reservation if to do so would interfere with tribal self-government.[9] But the determination of the scope of tribal self-government as it affects non-Indians presents a unique set of problems. In the American federal system the jurisdiction of a government is determined by its geographical limits and by Constitutional provisions. But over the years the courts have made exceptions to the geographical rule in the case of "legitimate state interests" and have allowed state governments to assert certain powers over non-Indians on the reservation without regard to tribal powers.[10] As a consequence the power of the tribes is eroded and the scope of Indian tribal self-government has been defined by the courts largely with reference to a general concept of Indian tribal sovereignty and general philosophical considerations concerning self-government rather than with reference to the specific constitutional provisions of the individual tribes. Indeed, in New Mexico there are several tribes with no written constitution, and the courts have never pretended to be experts on the legal systems or governmental institutions of Navajo or Pueblo societies.[11]

Most of the past court decisions relating to the powers of Indian tribes have arisen out of fact situations involving a state government asserting powers on the reservation and not out of facts in which the tribe was asserting broad governmental powers, as for example complete jurisdiction over non-Indians on the reservation. It is clear, however, that the scope of tribal self-government must include more than, simply, powers over Indian property on the reservation and over tribal members,

and the U.S. Supreme Court has recognized that fact as recently as the McClanahan case. The power of self-government - if it is to be meaningful - must include certain basic powers to control the behavior and activities of non-citizens of the tribe if only for the protection of the community. But tribal powers have been left unexercised over the years and neither the courts nor Congress have aided in defining the appropriate limits of tribal self-government on the reservation.

The importance of the "interference with tribal self-government" test cannot be overemphasized. Under this rule, every state tax on the reservation if upheld, implies a limitation of tribal self-government even if the tax falls wholly on non-Indians and their property. Therefore every state attempt to impose a tax on the reservation poses a threat to the survival of tribal government and may be seen by tribal leaders as a threatening act. It is most difficult to imagine how tribal and state government could hope to cooperate in the solution of common problems in such a threatening and divisive atmosphere.

B. The "Jurisdictional Vacuum" (Tax Haven) and Tribal Pre-emption

The non-Indian American concept of government tends to be an activist one, giving broad responsibilities to the various levels of government to solve a variety of social problems. To a large extent, cultural differences account for the difference between that philosophy of government and the general Indian approach. Each society makes its own determination as to the proper role for various social institutions, and the traditional Indian concept of formal government is much more limited. Many of the roles played by government in the non-Indian society would be filled by other institutions in the Indian society, such as the religion, the clan or kinship system.

Indian tribal governments have historically concerned themselves with the needs of their own members, and historically the major pressure for change has been for the convenience of the federal agencies dealing with tribal government - largely the Bureau of Indian Affairs but more recently including the Department of Housing and Urban Development and the Economic Development Administration. Otherwise federal officials have tended to discourage tribes from acting as governments of general jurisdiction. In addition, it must be recognized that tribal leaders often have avoided those governmental responsibilities which were beyond the immediate technical capabilities of the tribal government and those which were costly and burdensome and did not pay for themselves. Because the taxing power was undeveloped (and because there was little private property and economic activity to tax) there was little general tribal tax revenue to pay for basic services.

A common argument for expanded state or federal power on Indian reservations is that the tribes are failing to govern in areas where government is needed. As the tribal society and economy have become more complex, the governmental activities of the tribe in the areas of taxation and regulation have not kept pace. As a result, there are areas which the state taxes and regulates off the reservation but for which there is no corresponding tribal governmental coverage. When the state undertakes to extend its jurisdiction over these areas on the reservation, the decisions concerning the allocation of power between state and tribal government on the reservation will be made by the federal courts. There is a likelihood that the courts will take an activist view of tribal government, holding that the limits of tribal self-government are drawn by the powers exercised rather than theoretical limits based upon an agreed definition of self-

government. Those areas which the tribe does not affirmatively fill (and which the state does fill off the reservation) may be considered by the courts as a jurisdictional vacuum to be filled by state power.[12]

But of course, this analysis if it is indeed adopted by the courts works contrary to the tribe's right of self-determination and the federal policy of supporting Indian self-government. An essential attribute of sovereignty is the discretion to act; a government's decision not to tax or regulate is as much an exercise of self-government as is the decision to impose taxes or regulations. It is extremely ironic that this arises in an Indian context. No one seriously suggests that, because Connecticut and Nevada do not impose personal income taxes, the United States or another state should step into the "vacuum"; or that the taxation of income is outside the scope of Connecticut or Nevada sovereignty. It would be most regrettable if the tribes were forced as a defensive strategy to adopt a tax or regulation each time the state did in order to preempt the field from the state by demonstrating an actual interference with affirmative tribal self-government. The tribes would then become the mirror images of state government rather than the institutions for governing a tribal society in the modern world which they are intended to be.

Several principles must be recognized in dealing with the problem of jurisdictional vacuums or tax havens. First, it cannot be assumed that the scope of tribal self-government includes only those areas affirmatively filled by tribal governmental action. The tribes must be free to develop their own tax structure based upon the needs and public policies of the reservations. Second, because of the historical inattention to tribal government as a fully functioning government of general jurisdiction there are now actual and potential tax havens on the reservation which are not

the result of deliberate and well-planned tribal policy decisions. These vacuums offer an undeserved windfall to private enterprise and weaken the tribes' overall cases for self-government without providing them corresponding benefits. Third, the responsibility is now with the tribes, assisted by the Federal Government, to define their concept of tribal self-government - particularly as it affects non-Indians on the reservation - and to make their tax structure clear so that the courts and the state government will have notice of what the limits of tribal power are.

SECTION III. - LITIGATION IS THE LEAST DESIRABLE METHOD OF RESOLUTION

It must be concluded from this study that litigation is not a satisfactory means of resolving problems in the tribal/state tax relationship. Litigation is costly, time-consuming (and never-ending) and usually does not result in definitive rulings beyond the immediate facts. Because of the lack of specific federal legislation on the subject and the vagueness of treaties where treaties exist, tax problems should not be resolved in the courts if there is any reasonably acceptable alternative. There are no general principles to guide the courts in reaching their decisions, and they are left to develop a definition of tribal self-government virtually on their own.

It is to be expected that the administrators of the state tax structure will press to collect taxes wherever they can - that is part of the job and the natural predisposition of tax collectors. As administrators, they have questionable authority to compromise with tribal government where diplomacy and policy might dictate and where efficient and coordinated tax and development policies between state and tribal governments might demand. State officials can be expected to try to limit "pro-tribal" decisions to their facts and interpret "pro-state" decisions as broadly as possible.

At the same time, it is to be expected that anyone who can make a colorable claim for an Indian or Indian-derived tax exemption will do so - that is part of the predisposition of a taxpayer. And in light of the "interference with tribal self-government" rule, it is to be expected that tribal officials will fight any further incursions of state governmental authority on the reservation out of a sense of responsibility to preserve the prerogatives of tribal government, and that they will seek the support of the Federal Government in so doing - even when the tribe itself or Indian individuals may not immediately benefit from a "pro-Indian" ruling. Because of the posture of much tax litigation, the Indians find themselves being forced by circumstances to defend economic interests which have not benefited them and with whom they have little else in common. At other times, vital interests of the tribes are litigated between the state and the taxpayer without the tribe being represented.

As we have seen, virtually all of the "rules" of present Indian tax law are open to debate with respect to any set of facts that is likely to occur on the reservations in the near future. Strong arguments can be developed both for and against the state's ability to tax, and the final decision may be highly arbitrary. The state has greater resources with which to develop both its legal arguments and its ability to impose and collect taxes; the outcome of litigation may thus be affected more by the distribution of present resources than by the merits of the legal argument. The tribes with their limited resources are therefore at a disadvantage in the courts.

But above all, it seems that the resolution of tribal/state tax problems is too important to be left to a gladiatorial contest in the federal courts. Such matters are of high importance to the public policy of the State of

New Mexico, the Federal Government and the Indian tribes themselves. The resolution should be the result of deliberate policy judgements on the part of the highest elected officials of the governments concerned and not the result of staff determinations and relatively unguided judicial speculation on the nature of self-government. Little real progress will be made as long as both state and tribal officials see the intergovernmental tax relationship as one which should be resolved in the courts. Bureaucrats and lawyers will forever find new issues to be litigated. The courts will resolve the immediate cases before them with the best intentions but without sufficient guidance from the proper policymaking bodies. The only conclusion is that the leadership of both the state and the tribes must take this vital issue in hand and away from the bureaucrats. The American Indian Law Center is convinced that solutions are possible if the problem is approached with leadership, diplomacy and a spirit of compromise.

SECTION IV. - THE TRIBAL TAX STRUCTURE IN RELATION TO THE STATE - SOME GENERAL PRINCIPLES

There are areas of both taxation and regulation in which the tribe has not affirmatively acted but does not want to waive its right to act later and above all does not want to confer by implication jurisdiction to the state. Some of these areas may be those in which there is room for argument as to the appropriateness for government action. Others may well be areas in which it is simply a practical necessity that some government exercise powers of taxation and regulation - true jurisdictional vacuums in which if the tribe does not act soon the forces of change will require state or federal action.

But in the area of taxation particularly it is important that the so-called jurisdictional vacuums or tax havens be examined closely in light

of fundamental taxation principles. Tax policy is based on more subtle considerations than simply raising revenue to pay for government services. Sometimes for social or economic reasons a government will tax an activity or commodity in order to either discourage or encourage its use. Tax advantages for the purpose of encouraging certain kinds of activity are common,[13] or to redistribute income within the society, particularly where there is a profit that can be "exported."

Where a tribe has "failed" (or declined) to impose a tax, the basic question should be whether this was merely an oversight, whether it was the result of mistaken economic analysis, or whether it is the result of a conscious and deliberate tribal policy based upon a comprehensive taxing scheme. Of course, it is recognized that for most of the Indian tribes in the country no such comprehensive analysis has been completed. Tribal taxation systems, such as they are, have grown helter-skelter over the years, much as the state and federal systems have. The tribes above all recognize that their systems are in a very rudimentary state. At this stage in the analysis of the tribal/state tax relationship it is not safe to assume that a tribal failure to tax is either the result of a conscious tribal policy decision or that it creates a jurisdictional vacuum which should be filled by state action.

Indian tribes have unique attributes which will condition the development of their tax policies and most likely make them unlike those of the states. First, an Indian tribe - particularly in New Mexico - in addition to being a government is the major landowner within its jurisdiction. A major portion of the tribe's economic development policy can be implemented directly through its management of the tribal estate. The tribe's constituent citizenry can be assumed to have a large degree of cultural uniformity,

particularly in relation to the surrounding society, and in the present conditions of the tribe the vast majority of this constituency is composed of poor people. Thus the tribe's economic development policy, even such major questions as whether and how to develop major tribal resources, will be affected by cultural values which are virtually unknown and unfelt in the political life of the state. At the same time, the economic viability of ventures involving tribal resources bear directly on the responsibilities of the tribe as a government as well as the tribe as a landowner.

At the same time, the state has interests and responsibilities on the reservation. Individual Indians are citizens of the state as well as of the tribe, and the state is bound to provide them with public services. And the state has a responsibility for the economic well-being of the people of the reservation to the same degree that it has assumed responsibility for its other citizens, despite the fact that its powers on the reservation are limited. Even if the state did not have an affirmative duty to advance the economic well-being of its Indian citizens on the reservation, it would be in the interest of the state to cooperate with tribal development plans in order to reduce the potential demand from the reservations for social services delivered to the economically deprived.

Thus it would seem that there are strong reasons for the state to begin discussions with the tribes with a view toward coordination of taxation and economic development policies for their mutual benefit. It could be argued, of course, that such discussions could prejudice the state's posture in future tax litigation, but one of the major conclusions of this report is that this argument should serve to discourage further litigation to resolve problems rather than discourage cooperation and compromise.

SECTION V. SPECIFIC RECOMMENDATIONS FOR THE NEW MEXICO COMMISSION ON INDIAN AFFAIRS

A. Research the South Dakota Experience

For the past several years the State of South Dakota has had a working task force on tribal/state relations. The first area explored by this task force was the intergovernmental tax relationship, and the task force produced a number of recommendations for cooperative efforts, some of which were enacted into law by the legislature of the State of South Dakota. This South Dakota experience represents one of the few times in history that state and tribal governments have cooperated in an atmosphere of mutual respect and compromise.

This report recommends that the New Mexico Commission on Indian Affairs issue an invitation to the task force director from South Dakota to visit and share his experiences with the Commission so that New Mexico may profit from the work and avoid the mistakes of South Dakota.

B. Meet with the Governors and Tribal Chairmen

Both sides must be willing to negotiate, of course. It is recommended that the New Mexico Commission on Indian Affairs adopt the intergovernmental tax relationship as a high priority item for the indefinite future. Meetings should be scheduled with tribal organizations to discuss the tax situation in depth and to determine whether the tribal leadership is interested in developing cooperative agreements with the State of New Mexico.

A necessary first step prior to fruitful discussion with the state is for each tribe to develop individually a sound plan for the development of its own tax structure. The Commission could offer to assist the tribes in securing technical assistance to conduct a thorough study of the taxable resources on its reservation and to develop a tax system in keeping with

the tribe's general public policy. For example, a tax-sharing and collection agreement on sales taxes proved to be the easiest to administer in South Dakota. It would seem, however, that a tribe would consider a sales tax on its low income population to be of relatively low priority if there are alternative taxable sources available.

C. Meet with the Governor of the State of New Mexico

If the tribes are interested in working cooperatively with the state on tax matters, the New Mexico Commission on Indian Affairs could play a key role in attracting the interest of the Governor of New Mexico in such a cooperative effort. Building on the present study, the Commission could assemble a briefing paper for the governor and his staff to persuade them of the relative advantages of cooperation over the inefficient litigation method of resolving disputes. It can be expected that the tax administrators of the state will be found in opposition to intergovernmental cooperation, but the elected leadership of the state may well find a fresh approach to be attractive in its promise to break the present stalemate, to provide a more efficient and dignified means of resolving problems, and to demonstrate national leadership in resolving tribal/state problems. (In this connection it might be noted that the momentum of the South Dakota experiment has been somewhat slowed due to the recent militant activities by both Indian and non-Indian groups in South Dakota and the political opposition which they have created to state/tribal cooperation.)

If the governor displays an interest in a cooperative effort, it is suggested that the proper role for the New Mexico Commission on Indian Affairs would be as a coordinator and go-between. The actual discussions should be conducted and supported out of the governor's office directly with the highest tribal leadership.

SECTION VI. - PRINCIPLES AND DISCUSSION

A. THERE MUST BE OFFICIAL RECOGNITION BY BOTH TRIBE AND STATE THAT THE TAX RELATIONSHIP IS INTER-GOVERNMENTAL AND THAT ALL DISCUSSIONS WILL TAKE PLACE WITH DUE RESPECT FOR THE GOVERNMENTAL RESPONSIBILITIES OF EACH PARTY. Tribal leaders cannot ignore the political reality that the state has an effect on tribal interests and will continue to do so. Tribal leaders must regain confidence in their negotiating skills and realize that they are conceding no major points by sitting down as equals with the state for a discussion of tax problems.

At the same time, the state leadership must realize that a constant state pressure on the tribes is destructive and self-defeating. The highest state leadership should make special efforts to resist the natural pressure from tax authorities to expand the reach of the state taxing power and to collect taxes from all possible sources, resolving all policy issues against the tribal interest.

B. THIS REPORT RECOMMENDS A TENTATIVE ACCEPTANCE BY THE STATE OF A STRICT GEOGRAPHICAL DEFINITION OF TRIBAL SELF-GOVERNMENT, INCLUDING ALL MATTERS WITHIN THE GEOGRAPHICAL BOUNDARIES OF THE RESERVATION. It is realized that this is a radical proposal which may occasion considerable political controversy. It must be recognized, however, that progress in this area will be difficult at best considering the natural suspicion of the state by the tribes. If any discussions are conducted to the counter-point of anti-tribal revenue rulings and "test cases," meaningful discussion will be impossible. A moratorium on aggressive state enforcement in areas of questionable jurisdiction is of prime importance. (It may help to have a study of the present revenue which will be lost if this recommendation is adopted. It is suggested that the revenue which would then be lost is

minimal, and would represent a worthwhile investment on the part of the state.)

It is assumed that the primary interest of both the state and the tribe is that those who receive services and are able to pay taxes do not escape taxation. Whether the tax is paid to the tribe or the state should not be the definitive issue if the goal is a rational and coordinated taxation and economic development strategy. A moratorium on aggressive enforcement of the state's interest pending discussions with the tribes would be a spectacular gesture of goodwill and would not be unduly costly to the state in the long run.

C. THIS REPORT RECOMMENDS ARTICULATION BY THE STATE OF ITS INTEREST IN THE ECONOMIC DEVELOPMENT OF THE RESERVATION AREAS - AT LEAST IN A ROLE SUPPLEMENTARY TO THAT OF TRIBAL GOVERNMENT, AND AN ANALYSIS OF THE STATE/TRIBAL TAX RELATIONSHIP IN THIS LIGHT. The economic underdevelopment of reservation areas constitutes a drain on the state revenue in several areas, not the least of which is the cost of higher than average public services in some reservation areas. The failure to recast the state/tribal tax relationship into the context of tribal economic development may in fact have self-defeating aspects to it. Thus before the questions of jurisdiction and "tax havens" can be reached, an overall economic development strategy should be discussed as it affects the tax enforcement policies of the state affecting the reservations.

D. THE TRIBES SHOULD AGREE TO DEVELOP TAX POLICIES AND TAX STRUCTURES AND SHOULD SEE WHERE SUCH DEVELOPMENT WOULD BE THE BEST POSSIBLE PROTECTION AGAINST FURTHER INCURSIONS BY THE STATE INTO TRIBAL SELF-GOVERNMENT. The tribes must recognize that there are actual and potential tax havens on reservations throughout the country. Some industries and developments

avoid both tribal and state taxes and yet do not add measurably to the solution of long-range tribal economic problems, or force the tribes and the state to incur costs which far outweigh their contribution. The long-range, economic and political interests demand that these loopholes be closed either by a direct tribal tax or by a negotiated agreement which would allow the state to tax without constituting a permanent and crippling waiver of the tribe's authority to tax.

The only tax advantages which should be allowed on the reservation by the tribes should be those which are in some way vital to the public policy of the tribes, either by protecting the citizens and culture of the tribe or by contributing proportionately to the solution of persistent reservation economic problems. Only if a tax advantage is justified in terms of the affirmative tax policies of the tribal government should the tribe be interested in protecting taxable entities from the taxing power of the state.

E. DIALOGUE WITH THE ATTORNEY GENERAL. Any discussions between tribal leaders and the state would necessarily include the Attorney General as the independently elected law enforcement arm of the State Government. It might be possible to explore a "Joint Powers" agreement between the tribal sovereignties and the state which would allow joint taxing without raising the issue of invasion of tribal sovereignty.

PART II

LEGAL BACKGROUND

The first significant case defining the relationship of tribal self-government to the corresponding powers of the federal and state governments is Worcester v. Georgia, 6 Pet. 515 (1832) which held that all power to regulate Indians resided in the Federal Government and without federal permission, states could not act. Additionally, the court recognized that all powers which Congress had not taken away from the tribes, still resided in the tribe. This recognition of plenary power in Congress and residual sovereignty in the tribes is still the controlling principle of Indian law.[1]

The modern application of this principle of residual sovereignty is expressed in terms of jurisdiction.[2] In 1959, the Supreme Court was called upon to test the continuing vitality of Worcester v. Georgia, supra, in the context of a civil suit over non-payment of a debt. Two Navajo Indians in Arizona were sued in a state court over their failure to pay debts incurred at a store owned by a non-Indian. The court in Williams v. Lee, 83 Ariz. 241, 319 P.2d 998, 358 U.S. 214 (1959), held that the state had no jurisdiction because state jurisdiction would interfere with the tribe's right of self-government. Thus a new test of state action was created, which stated, absent a governing act of Congress, state action was permissible if it did not interfere with a tribal right of self-government. This test appeared to open a new area for state action pointing to an apparent void between Indian jurisdiction and federal control. But in New Mexico the state's disclaimer clause in the State Constitution would seem to preclude the state exercising jurisdiction in this area.[3] However, the effectiveness of state disclaimer clauses is

called into question by the Supreme Court case of Kake v. Egan, 7 L.Ed.2d 573 (1962). The case involved the Secretary of Interior's authority to regulate off-reservation fishing in a manner contradictory to Alaska's State Fishing Laws. The court held Alaska's disclaimer clause (similar to New Mexico's) was a disclaimer of proprietary interests rather than governmental and that exclusive federal control of Indian matters did not necessarily mean absolute in the sense it precluded all state action. States with disclaimers have tried to use Kake to extend their jurisdiction onto reservations by classifying their action as governmental. Kake however was a case involving non-reservation Indians involved in an off-reservation activity, a situation non-existant in New Mexico.

The Supreme Court recently attempted to clarify the Williams and the Kake tests. In McClanahan v. Arizona Tax Commission, 411 U.S. 164, 36 L. Ed.2d. 129, 93 S.Ct. 1257 (1973), the court held that the State of Arizona could not impose its state income tax on an Indian resident of the Navajo reservation who was deriving her income from reservation sources because the state lacked jurisdiction. The court pointed out that Williams went primarily to non-Indian activities and that Kake was limited to its facts and did not apply to reservation activities. Unfortunately the Kake reasoning still influences tax cases in New Mexico. In Norvell v. Sangre de Cristo, 348 F.Supp. 349 (1972) the state was allowed to impose numerous taxes and other regulations on non-Indian residents and businesses on land leased from a pueblo, because the state action did not interfere with the tribes right of self-government. The district court apparently ignored McClanahan's limitation of the Kake and Williams cases holding that the particular powers in question did not interfere with the tribe's right of

self-government. The tribe was not a party to the Norvell case and therefore the compelling tribal interest in regulating such activities was not vigorously and thoroughly presented.

The court also incorrectly assumed that if the law effects non-Indians, the state has an interest in intervening to the exclusion of the tribe and that tribal rights of self-government extend only to simple matters affecting primarily and directly Indians. Norvell is on appeal and hopefully Indian self-government interests will be vigorously presented and the incorrect assumption will be rectified.

The applications of the tribal right to self-government will have to be determined by examining each individual tax, but the courts have held such examination comes into play only when there is a non-Indian interest. If the subject matter is purely Indian, the Supreme Court's latest pronouncement in McClanahan on tax immunity from the state is applicable. As noted earlier, McClanahan voided Arizona's attempt to impose an income tax on the reservation because Arizona lacked jurisdiction. McClanahan appears to establish the following rule concerning state taxation on Indian reservations. If the subject matter is Indian and within the reservation, the state has no power and that power may be obtained only in a way specified by Congress. If the subject matter deals with non-Indians and within the reservation, the Williams' test of whether the claimed action violates either a governing act of Congress or interferes with the tribe's right of self-government is applied. If the subject matter is Indian and the activity is off reservation and is not protected by an act of Congress,[4] the state may exercise jurisdiction using the rationale of Kake.

The essence of a tribe's power to levy taxes is the fact it has not been taken away by Congress. Tribes may exercise the full gamut of their residual powers, restricted or limited only by express acts of Congress. The power to tax has been recognized as a residual power. Buster v. Wright, 135 Fed. 947 (1905), Morris v. Hitchcock, 194 U.S. 384 (1904), Iron Crow v. Oglala Sioux Tribe, 231, F.2d 89 (1956), Maxey v. Wright, 54 S.W. 87, 105 F. 1003 (1900). But, the bare power to tax is not itself a solution. The tribe must exercise their taxing power to protect themselves from incursions in the taxing area by state and local governments. The tribes' power to resist these incursions rest on their residual sovereignty, the principles of Worcester, and the trust relationship with the Federal Government.

FEDERAL CONTROL

Congress has plenary power over all Indian matters. This power stems from three sources. First, the Constitution contains two sources of power. It grants to Congress through the commerce clause the power to regulate intercourse among Indians and the treaty making power of the executive has historically extended federal power as well as vesting it with substantial obligations. Today, both of these sources are seldom used to justify federal authority. Secondly, in Cherokee Nation v. Georgia, 5 Pet. 1 (1831), a precursor to Worcester v. Georgia, Chief Justice Marshall in dismissing the Cherokees suit for lack of jurisdiction, noted that the relationship between the United States and the tribes resembled that of a guardian to his ward. This analogy elevated to a definite legal principle is the present source of much of the claimed federal authority over Indian tribes.[5] Thirdly, the concept discussed

in early Indian cases that federal power over Indians is inherent in the United States Government's ownership and dominion over all the land within its borders.

All the above theories provide the legal basis for federal authority to preclude state taxation of Indian tribes and lands. Several concepts have been developed by the courts to implement this federal authority. In the past, perhaps the most compelling to courts has been the concept of federal instrumentality. It is argued that a particular item used by the tribe whether it be realty, personalty or money is a federal instrumentality that is being used to implement a specific federal purpose. While this doctrine may be on the decline,[6] it has been the basis for most federal exemption of Indian property from state taxation.[7] The exemptions that have been established either by statute[8] or by case law are well known and preclude debate as to possible state taxation. One may note that many of these exemptions are recognized by the State of New Mexico either by state law or case law.[9]

Another concept developed to restrict state taxation attempts of Indians and Indian property is federal preemption. The Supreme Court in McClanahan noted that, "...the trend has been...toward reliance on federal preemption"[10] as a bar to state attempts to extend jurisdiction over tribal communities. The doctrine is complimentary to federal control because where the government has acted specifically to control or regulate tribal affairs it has preempted the state from any similar action in those areas. Thus, because of extensive regulations the Federal Government has preempted the field of regulating federally licensed traders on Indian reservations. Since the Federal Government

regulates these traders, the state cannot.[11] Similarly on a broader scope, where the Federal Government has acted to regulate, or entered into agreements with a tribe, it has divested the state of any power to do likewise.

SUMMATION

In analyzing state attempts to infringe on tribal lands and Indians within reservations the three concepts of tribal sovereignty, federal control, and federal preemption must be considered as a whole. First, it must be remembered that tribes still retain inherent, though restricted powers of sovereignty whether they exert the powers or not. Any state interference with such power can be viewed as an infringement on a tribe's right to self-government and cannot be tolerated or validated. Secondly, because of the tribes' unique relationship to the Federal Government as self-governing bodies, and benefactors of the trust created by the guardian - ward relationship, the states have no jurisdiction over tribes unless expressly granted by Congress or treaties. Thirdly, in exercising its guardianship role, the Federal Government can preempt the state from any type of tribal regulation. Therefore, where the Federal Government has not given explicit consent or where it has acted to preempt the field, the state is at a loss to enforce its laws or regulations over an Indian tribe, especially in the field of taxation.

TRIBAL TAXATION POWER OVER INDIVIDUALS

As previously noted, the tribe retains certain aspects of sovereignty, subject to Congressional action. One attribute of this inherent sovereignty, is the power to tax.[12] There is no dispute over the tribe's power to tax its own members. The issue arises when tribes attempt to

tax individuals who are non-Indians living on the reservation or within the exterior boundaries of the reservation. Generally case law holds that the tribe may tax non-Indians on the reservation.

Three major cases which establish this precedent are Buster v. Wright, supra, Morris v. Hitchcock, supra and Iron Crow v. Oglala Sioux Tribe, supra. In Buster v. Wright, several non-Indians had settled within Creek Indian country, and had established various businesses on the reservation. The Creek tribe imposed a privilege tax on the business. A privilege tax is a tax based on the privilege to do business on the reservation. They refused to pay the tribal tax, so the tribe closed down their establishments. The non-Indians contested, but the United States Supreme Court upheld both the Creek's tax and their actions to enforce its payment.[13]

This holding reiterated an earlier ruling by a lower court which also upheld the Creek's ability to tax non-Indians within their borders. In Maxey v. Wright, supra, the court held that since there was no act of Congress or treaty agreement abrogating this right of taxation, the Creek Nation could impose an occupation tax on non-Indians living within the reservation.

In Morris v. Hitchcock, supra, the Chickasaw tribe levied a privilege tax on non-Indian merchants, traders and physicians, as well as any property held by non-Indians within Indian country. The court upheld the tax because such action was within the sovereign power of the tribe, and was sanctioned by the President, and did not constitute an arbitrary exercise of power.[14]

The case of Iron Crow v. Oglala Sioux Tribe, concerned a tribal

member who brought suit against the tribe on behalf of a non-Indian who was leasing land from him. The Indian sought to enjoin the tribe from imposing a privilege tax against the non-Indian lessee for grazing his cattle within the reservation. The Indian plaintiff contended that the tribe did not have the power to tax the non-Indian lessee. But, the court upheld the tax, reasoning that the tribe still possessed the inherent right as a sovereign to tax except where it had been specifically taken from it either by treaty or by Congressional action.[15]

Over the years, solicitor's opinions have continued to recognize the power of the tribes to tax Indians and non-Indians alike by upholding tribal ordinances levying such taxes.[16]

This power to tax non-Indians stems from the tribe's continued self-governing status; its power to remove property of non-members from within its territorial limits; and various treaties. Even the Indian Reorganization Act acknowledged this right to tax.

Far from diminishing over the years, this concept has continued vitality. One of the most recent examples is U.S. v. Pollman, 364 F.Supp. 995 (1973). The confederate Salish and Kootenai Tribes required non-Indians to secure a tribal permit before being able to fish within recognized tribal waters. A non-Indian was fined for failing to procure a license before fishing in tribal waters. The court held that, even though a P.L.-280 tribe,[17] it still had the power to regulate non-Indians to this extent. Under Public Law 280 the state was allowed to regulate only certain specified areas of criminal and civil litigation. Despite this, the tribe still retained its right to regulate non-Indians within its borders by way of licensing, which is just another form of taxation.

But, a tribe's ability to tax everyone within its borders may not be all pervasive. It could be argued theoretically that the Federal Government may preempt a field not only from state intervention, but from tribal as well. For instance, Congress had delegated by statute the power to regulate trade with the Indians exclusively to the Commissioner of Indian Affairs. Therefore, it could be argued that Congress meant by this exclusive grant to preclude tribal interference with federally licensed traders. Thus it is an area that Congress has legislated away from possible tribal control. Felix S. Cohen, an important legal scholar of Indian Law has also made such an observation.[18] It could be argued however, that all that is required by the statute is for the commissioner to consent to the tribal taxation of federal licensed traders. In total opposition to the preemption argument it could be argued that as a policy consideration, it has been the federal intent, over the years, to insure that tribes become economically independent. Therefore, Congress could and should act to allow tribes to tax even federally licensed traders in order to insure that tribes be given every possible chance to attain full economic self-sufficiency. Otherwise, Congress would hinder its own policy of increasing tribal economic development by cutting off a source of already limited revenue.

STATES TAXING NON-INDIANS WITHIN INDIAN COUNTRY

Generally, the state's power to extend its laws over non-Indians within Indian country includes its power to tax them, but this does not mean they can exclude a tribal tax.[19]

In Utah and Northern Rail Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542, and subsequent cases, the state was allowed to tax non-Indian property

within Indian country because, "...it is not perceived that any first rights of the Indians under the treaty can be impared by taxing the... property..."[20] The contention is that so long as the state's taxation of non-Indians does not interfere with Federal Governmental regulations or tribal self-government, it is valid. But, tribes are beginning to consider expanding their tax bases, and state taxes on non-Indians taxed by a tribe might constitute interference with tribal self-government and its regulatory powers, thus invalidating the state tax.

CONCLUSION

Tribes have the power to tax Indians as well as non-Indians within their borders. In turn, tribal lands and Indians on the reservation are exempt from most taxes levied by the state. These general powers and exemptions are limited only where specified by the Federal Government or treaty provisions. Federal or treaty permission to tax Indians and Indian lands must be explicit.

Presently, states have the power to levy taxes against non-Indians within a reservation unless restricted by federal action. This may change if tribal governments begin taxing in the same areas as the states. The question of whether the states' taxing of non-Indians constitutes interference with tribal self-government would be raised. There are many possible outcomes. A double tax may simply have to be apportioned along Constitutional lines, a balancing of interests or such taxation might be a sufficient infringement on tribal self-government and thus require exclusion of any similar state tax.

NEW MEXICO'S TAXES

New Mexico's taxing structure is not based on a monolithic system. New Mexico's regulation of taxes is actually spread among four major departments. Under the Tax Administration Act, Laws 1965 Chapter 248, Section 1, the Bureau of Revenue was vested with the responsibility of collecting and regulating the bulk of the state taxes such as income, gross receipts, compensating, etc. The Bureau is governed by New Mexico Statutes Annotated (hereafter NMSA) 72-13-94. The State's ad valorem tax is regulated by the Property Appraisal Department which took over the duties of the former State Tax Commission under the Property Appraisal Department Act, Laws 1970 Chapter 31, Section 1. It is regulated by NMSA 72-25-1 to 72-25-21. While the Bureau of Revenue collects severance tax on natural resources, the Oil and Gas Accounting Commission regulates severance tax on oil and gas production under the Oil and Gas Severance Act, Laws 1959, Chapter 52, Section 1 and NMSA 72-19-1 and following. Motor vehicle registration is governed by the Department of Motor Vehicles under chapter 64 of the New Mexico Statutes annotated, 1953 Compilation.

Counties, municipalities, and cities can levy limited taxes, under Article 4 of Chapter 72 of the New Mexico Statutes annotated, 1953 compilation. But, the bulk of revenue is ultimately levied by the state mainly under the Bureau of Revenue and the Property Appraisal Department. The state and its subdivisions draw on over 150 different sources of revenue. Obviously, this report cannot be expected to cover a study of such sources. Instead the report will attempt to analyze eleven major areas of taxation levied by the state. Any agruments for or against the state's ability to levy such taxes on Indians within reservations would also be applicable to the state's subdivisions, such as

counties and municipalties.

PROPERTY TAX

The state taxes all property; real, personal and intangible. NMSA 72-1-2 to 72-1-25. This does not apply to tribes and Indians living on a reservation. The state cannot tax any property owned by an Indian which is found within the exterior boundaries of a reservation.[21]

State taxation of Indian property both real and personal flies in the face of long established federal policies. The exemption's intent was to allow Indians to compete in the non-Indian economic world. Past policies indicated that Indians quickly lose their properties to more sophisticated outsiders if the property is not granted some degree of protection. This protection is manifested in the trust status of Indian property both tribal and allotted lands. The exemption has been extended to personal property through the concept of federal instrumentality, discussed previously. Thus any item used by the tribe is being used to implement a federal purpose and any interference with the goal is unacceptable.[22]

Some recent cases which have clarified this position are Makah Indian Tribe v. Clallum County, 440 P. 2d. 442 (1968), Sohol v. Clark, 479 P. 2d. (1971), Soldier v. Carlson, 350 F. Supp. 65 (1972), Mescalero, supra, and McClanahan, supra. Makah held that personal property of a husband and wife used and maintained on a reservation is non-taxable by the state, even though the husband was a non-Indian. In Sohol the court found that a business owned by an Indian on restricted lands is exempt from county ad valorem personal property tax. Soldier held that the state lacked jurisdiction to tax Indian-owned mobile homes

on a reservation.

The two latest cases, Mescalero and McClanahan, make it very clear that the state has no power, absent Congressional action, to impose any type of property tax on Indian held land or personalty within a reservation.[23]

Even though pueblo tribes have a unique status as constituted corporate bodies by the State of New Mexico,[24] they are also still reservations under the control of the Federal Government.[25] As such, they are also immune from state taxation on properties within the pueblo reservations.[26]

INCOME TAX

NMSA 72-15A-1 to 72-15A-15 govern income tax which is imposed on the income minus exemptions derived from business, property, or employment within the state by individuals or corporations.

An Indian living on a reservation and deriving his income from activities within the reservation is exempt from paying any state income tax.

In Commissioner of Tax v. Brun, 174 NW 2d. 120 (1970) the court held the state could not tax wages earned by a tribal member from employment on the reservation, while the court in White Eagle v. Dorgan, 209 NW 2d. 621 (1973) found that it could not tax any Indian on the reservation. New Mexico's view that an Indian's income derived from tribal activities while living on a reservation were taxable[27] has been changed by the recent cases of Mescalero, supra, McClanahan, supra and Hunt V. O'Chesky, 85 NM 388, 512 P.2d. 961.[28] The result of these cases is that the state cannot levy an income tax on any Indian living on a reservation, deriving

his income from any related reservation activity.

But, the State of New Mexico has tried to limit the impact of these cases as much as possible. The Bureau of Revenue's Ruling No. 73-110-1 of August 21, 1973 interpreted McClanahan and O'Chesky as still permitting the state to tax a Pueblo Indian's income if he is working and residing on the Navajo reservation or vice versa.[29]

The state's reading of McClanahan and O'Chesky is extremely confining and clearly erroneous. The main reasons for the court's decisions in McClanahan and O'Chesky were the states' lack of jurisdiction on a reservation, and the Federal Government's preemption of trade with the Indians. A state has no criminal or civil jurisdiction over Indians within an Indian reservation unless allowed by Congress or treaty, and this includes non-tribal members as well as tribal members.[30] There has been no act of Congress allowing the taxation of Indian non-members on a reservation. In fact, Congress, in enacting the Buck Act[31] restricted the state from attempting to tax Indians on reservations while allowing state taxation of other federal areas. There was no distinction drawn between Indian tribal members and Indian non-tribal members.

Fortunately, the New Mexico Court of Appeals has settled the issue in the Indians' favor. In Fox v. Bureau of Revenue, N.M. Ct.App. 1514 the court held that a member of a federally recognized tribe (in this case a Commanche) living on the Navajo reservation and deriving her income from the reservation does not have to pay a state income tax. The state has however appealed this decision to the New Mexico Supreme Court. Given the usual state animosity toward limitations on its

jurisdiction, there is always a chance that the holding may be reversed.

CORPORATE TAXES

New Mexico corporations must pay a filing fee upon incorporating of 10¢ for every $1,000 of capital stock authorized. Then it is subject every year to a franchise tax of 55¢ on every $1,000 of its capital stock.[32] Corporations are then liable for all other taxes including gross receipts, property, income, etc.

a) Tribes incorporated under the Indian Reorganization Act would not be subject to any such state corporate tax since they are not subject to state jurisdiction or control. Because of federal incorporation, the Federal Government has preempted the field to the exclusion of the state.

As previously noted, even though the pueblos are constituted corporate bodies by the State of New Mexico, they are not subject to state control. Pueblo communities do not derive their governmental powers from the State of New Mexico.[33] Lands of Pueblo Indians are still subject to Congressional control although held in communal fee-simple ownership.[34] Therefore, the pueblos, as corporate bodies, even though not formed under the IRA[35] are still not subject to state control or corporate taxation.[36]

b) Subordinate tribal economic enterprises whether organized under the umbrella of the IRA[37] or not, are not subject to state regulation or taxation. Such subordinate economic organizations are not treated as government corporations or federal instrumentalities, but are entitled to the same immunity from the state under the concept of tribal sovereignty.[38]

c) Any tribal enterprise, or private Indian endeavor, located and

operated without the boundaries of a reservation is subject to state taxes. Quoting Kake, the court in Mescalero, pointed out that "State authority over Indians is yet more extensive over activities...not on any reservation." The court then went on to say that:

> Absent express Federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory State law otherwise applicable to all citizens of the State...that principle is as relevant to a State's tax laws as it is to State criminal laws...[39]

But, it should be noted that even this broad authority of the state to tax Indian endeavors not within reservation boundaries can be limited where Congress has acted to do so. Therefore, the court held in Mescalero that even though a tribal enterprise located off the reservation was subject to "...the collection of New Mexico's non-discriminatory gross receipts tax..."[40] it was exempted from paying property tax on personalty which became "permanently attached to the realty."[41] The IRA Act of 1934 constitutes an express federal law preventing state interference even with an off reservation enterprise. Tribes have the power to tax and regulate any corporations they charter, Indian or non-Indian. The power is inherent as a power of self-government, and for tribes under the IRA, Section 17 recognizes this power.

MERCHANT's LICENSE TAX AND GROSS RECEIPTS TAX

A. License

There are state licensing fees[42] as well as county licensing fees[43] that are levied on businesses operating within the state.

1) An Indian merchant on a reservation would not have to be licensed by the state, and therefore would be exempt from the licensing

tax. McClanahan reestablished the fact: "...state law could have no role to play within the reservation boundaries."[44] The state does not have the power to regulate such businesses and therefore cannot impose such licensing fees.

2) Federally licensed traders, whether Indian or non-Indian, are exempt from state licensing.

3) Non-Indian merchants other than federally licensed traders would be subject to state licensing as well as tribal licensing. Unless licensing of such merchants by the state would result in an infringement on the tribes right to self-government.

B. Excise tax

The gross receipts tax levied by New Mexico for the privilege of doing business within the state, is levied on the seller, not the buyer. But, in practice, sellers generally pass the tax on to the buyer as added cost.

1) Indian merchants situated on a reservation whether selling to Indians or non-Indians are exempt from state sales tax.

As a sovereign, any such tax levied upon Indian people within the confines of a reservation must be viewed as a direct interference with the tribe's right to self-government. Also, the Federal Government has preempted the field in allowing the tribe to regulate itself. "...The Federal Government has been permitting Indians largely to govern themselves, free from state interference."[45] Mescalero further established that the state could not tax any reservation activity unless it has been authorized by Congress.

In White Eagle, supra, North Dakota's Supreme Court, relying heavily

on McClanahan held that:

> Business done on the reservation with reservation Indians is immune from state taxation not only because such business takes place on the reservation but also because the Congress, in the exercise of the power granted in the United States Constitution, has undertaken to regulate business on the reservation so completely that there is no room for the state to legislate on the subject.[46]

The Supreme Court of New Mexico has acknowledged this as the law, when it upheld the Court of Appeals ruling in O'Chesky:

> ...it was decided that the State of New Mexico may not tax income and gross receipts of Indians residing on a reservation...[47]

In an interesting ruling, a state court in the case of Confederated Salish and Kootenai Tribes v. Moe, Civil No. 2145 (D.Mont., filed May 9, 1974) held that the state could collect a sales tax from an Indian merchant selling to non-Indians on the reservation. The court reasoned that it was not a tax on the Indian merchant but on the non-Indian buyer, and was only collected from the Indian merchant, and did not interfere with tribal self-government. Refraining from arguing on whether the court ruled correctly or not, it should suffice to point out that in New Mexico the gross receipts tax is directly against the merchant.[48] Any attempt at levying such a tax would be a direct tax on an Indian and therefore invalid whether he sells to Indians or non-Indians.

2) Federally licensed traders cannot be subjected to a gross receipts tax when the sale is to an Indian.[49] New Mexico has acknowledged this fact.[50]

3) Non-Indian, non-federally licensed merchants on a reservation are subject to taxation on sales to non-Indians. Since its gross receipts tax is aimed at the seller, New Mexico contends that "receipts

of persons other than federally licensed traders from sales made on the reservation are subject to the gross receipts tax even though the purchaser is a reservation Indian."[51] This contention is still unclear even in lieu of recent law. Under a broad reading of McClanahan, the state could collect the tax as long as the taxed merchant is not allowed to pass on the tax, as cost, to the Indian buyer. This passed-on cost could constitute the paying of a tax by an Indian. Since the Federal Government has preempted the field of commerce with Indians, the state cannot collect any type of sales tax from an Indian on a reservation directly. It should follow that the state would not be allowed to collect it in an indirect fashion.[52] O'Chesky holds that the State of New Mexico cannot subject an Indian on a reservation to a gross receipts tax, and does not distinguish between one levied on him directly, or passed on to him as extra cost. To allow the latter to happen would subvert the intent of Congress and the law as expounded in the Soldier v. Carlson case discussed above.[53]

4) An Indian business, whether owned and operated by a tribe or an individual Indian, is subject to gross receipts tax if operated off the reservation. This is true even if the tribe operates a business on lands made restrictive through provisions of the IRA.[54]

5) NMSA 72-16A-14.9 states that governmental entities, including tribes, are exempt from paying gross receipts tax on tangible property, even if purchased off the reservation. Non-fissionable metalliferous mineral ore is the only exception to the exemption.[55]

Tribes can require the licensing of merchants, whether Indian or non-Indian, for the privilege of doing business within their borders.

They can also collect gross receipts taxes from Indians and non-Indians alike.

COMPENSATING TAX (USE TAX)

A compensating tax is levied on articles purchased out of state but used in New Mexico. Since the state cannot tax the out of state sale, it levies an equivalent tax on the buyer for the privilege of using the article within the state. Such a tax is also applicable when goods and services purchased for resale or other non-taxable use occasionally become diverted from the channels of trade and are used by the purchaser for a taxable purpose.

The problem with a compensating tax is twofold. First, can the state levy a use tax on an Indian living on a reservation, making a purchase outside of the reservation? And second, can the state require a tribe to collect a use tax on a non-Indian purchaser buying a product on the reservation for use outside of the reservation?

New Mexico exempts governmental agencies, including any Indian tribe or Indian Pueblo, from paying compensating tax in the use of property purchased out of state.[56] However, it does not exempt individual Indians making out of state purchases even though the property may be used exclusively on the reservation. But, in light of McClanahan and Mescalero, this tax should not be allowed. Since there is no Congressional enactment allowing for collection of such a tax, and since without this the state lacks jurisdiction to collect such a tax, the immunity from a compensating tax should be extended to individual Indians living on a reservation. Of course this leaves open the question of whether the state can levy the tax before it reaches the borders of a reservation, which

gives rise to further questions of hampering interstate commerce.

The second problem of tribal collection is not clear. The state still retains some taxing jurisdiction over non-Indians even while they are on a reservation.[57] It might be argued that if sufficient minimum contact exists between the Indian seller and the state, the state might require him to collect the tax for the state from the non-Indian buyer. This is the traditional Constitutional requirement for such an imposition.[58] The definition of minimum contact is not clear cut. The minimum contact must be more than a solicitation of business through the mails. There must be some actual contact with the seller, such as having a branch office in the taxing state, or salesman, etc. A better alternative would be for the state to collect its own compensating tax off the reservation. The state would acknowledge that since it does not have jurisdiction over the Indian seller to force him to pay a gross receipts tax, it also does not have jurisdiction to require him to collect the compensating tax, no matter how much contact exists between the Indian seller and the state.[59]

SEVERANCE TAX

A severance tax is levied on all natural resource products severed from the soil,[60] with the exception of oil, natural gas, and liquid hydrocarbon which are taxed separately by the Oil and Gas Commission.[61]

Under 43 Stat. 244[62] states can levy a severance tax on royalties of a tribe gained from mineral leased on a reservation.[63] In New Mexico the law is regulated by NMSA 72-19-4.[64] A tribe's liability for such state taxes has been upheld by the Secretary of the Interior.[65]

The ability of the state to collect such a severance tax goes only

to gas, oil, and minerals. The state cannot impose a severance tax on other natural resources such as timber, farm products, etc. as required by NMSA 72-18-1 to 72-18-27.

A tribe can collect its own severance tax on Indians as well as on non-Indians, and on any natural resources it chooses to designate.

ALCOHOLIC BEVERAGE TAX

A. Licensing

New Mexico liquor licensing is governed by NMSA 46-5-1 and following.

1) A liquor establishment on a reservation, if tribally owned and operated, is exempt from state licensing and any such fees that might be involved. It is exempt from state regulation as a tribal enterprise as stated in White Mountain, supra, and under the Congressional Act of August 15, 1953.[66]

2) A business owned by a tribal member would also not be required to pay a licensing fee to the state. The business would be subject to tribal regulations, not state.[67]

3) But, a non-Indian owned liquor establishment on a reservation would be subject to both state licensing fees and tribal licensing fees, if any.

B. Excise tax.

New Mexico levies an excise tax against the wholesaler.[68] Since the tax is on the wholesaler, it can be passed on to the Indian retailer as cost. In Makah Indian Tribe v. Tax Commissioner, 334 P.2d. 580, a Washington court ruled that a tax levied on a wholesaler selling to Indian retailers on an Indian reservation was valid. But, the State of South Dakota seems to believe otherwise. There is a strong argument

that a tax on a wholesaler ultimately falling on the retailer is in fact a tax on the retailer, and so where the latter is exempt it should not be allowed to be collected in an indirect manner.

Until the issue is settled, the tribal retailer might be able to avoid the tax by purchasing the liquor out of state.[69]

CIGARETTE TAX

A. Licensing

In New Mexico, retailers, wholesalers and distributors have to procure a permit on which they are taxed.[70] Presumably, this would not apply to Indian retailers or wholesalers on the reservation licensed by the tribe.

B. Excise tax

New Mexico levies a tax upon the "sale, give, or consumption" of cigarettes.[71] The tax can be levied on the wholesaler as a seller to Indian retailers, but it cannot be levied directly against an Indian seller, wholesaler or consumer on the reservation.[72] It would appear that an Indian retailer could avoid the tax passed on by the wholesaler by purchasing the cigarettes from an out of state source.

GASOLINE TAX

New Mexico allows the United States Government or its agency or instrumentality a deduction on gasoline.[73] It might be argued that a tribe and its tribal enterprises, as federal instrumentalities, are exempt from the tax. Of course it must be realized that the federal instrumentality doctrine may be on the decline. This was acknowledged in Mescalero v. Jones, supra. The Supreme Court created the doctrine and now feels that historical developments now render the theory less persuasive. The

court has stated that mere fact that property is used for federal purposes does not itself relieve it from state taxation. The tax exemption question is confused because of the Act of June 16, 1936,[74] and the Act of August 1, 1956[75] which allowed states to levy taxes on gasoline sold or used within federal reservations.[76] This has been interpreted by the New Mexico Bureau of Revenue to mean that:

> The excise tax imposed on the sale, use, or sale and use of motor fuel under Section 64-26-2 NMSA 1953 (later 72-27-1 NMSA) applies if motor fuel is sold to or used by an Indian residing on an Indian reservation.[77]

This interpretation is aided by an opinion of Secretary of the Interior,[78] interpreting the original Act of June 16, 1936. The Interior Opinion decided that gasoline sold to a Menominee Indian saw mill was exempt from state taxation because the saw mill was a federal instrumentality. But, the Opinion went on to state that gasoline sold from the mill to individual Indians and non-Indians was taxable under the Act because "other reservations" included Indian reservations. Under this interpretation, the Federal Government has presumably acted to allow the states to tax the tribe and Indians on the reservation for the use of gasoline.

The crucial issue is whether "other reservations" includes the tribes. Analyzation of the Congressional intent may find Congress never intended this interpretation. If this can be demonstrated, any such taxes would be invalid based on McClanahan, Mescalero, and O'Chesky. At the very least the designation "other reservations" seems ambiguous and following the usual rule of Indian related statutory construction, it should be interpreted in favor of the tribes. The tribes should not be included in the designation and should be exempted from any form of

gasoline tax.

Tribes have the power to require the paying of a gasoline tax on fuel sold within the reservation.

ESTATE TAX (INHERITANCE TAX)

In the case of Childers v. Beaver, 270 U.S.. 555 (1926), the State of Oklahoma sought to impose its inheritance tax on allotted lands passed to Indian heirs. The United States Supreme Court held that:

> It must be accepted as established that during the trust or restricted period Congress has power to control lands within a state which have been duly allotted to Indians by the U.S. and therefore conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people and the means or instrumentalities utilized therein cannot be subject to taxation by state without assent of the federal government.[79]

Years later in Oklahoma Tax Commission v. U.S., 319 U.S. 598 (1943), 87 L.Ed. 1612, the United States Supreme Court, dealing with allotted Indians, held that a state estate tax did extend to "cash and securities," derived from land and transferred to heirs. However, any lands that were directly exempted from taxation by Congress were not subject to the estate tax:

> We therefore hold that the transfer of those lands which Congress has exempted from direct taxation by the state are also exempt from estate tax.[80]

In West v. Oklahoma Tax Commission, 334 U.S. 717, 92 L.Ed. (1948), the Supreme Court upheld an inheritance tax on property held in trust for an Osage Indian. The court contended that the inheritance or estate tax was not levied on the property but upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits.

It also stated the Osage were assimilated to such an extent, they had no claim to sovereignty and therefore no immunity from such a tax.

The two Oklahoma cases concerned allotted lands and a specific Act of May 10, 1928,[81] requiring an application of the Act to the allotted lands. The Act could not be construed as an act of Congress giving states generally the authority to levy an inheritance tax on restricted lands or income from such lands.

The former Oklahoma case, Oklahoma Tax Commission v. U.S., held that lands exempted from any other type of taxation, such as property tax, as restricted by Congress, are also exempted from any type of inheritance tax. This would seem to verify the exemption of all tribes in New Mexico. However, McClanahan has held that "economic benefits" derived by tribal Indians from tribal lands are immune from state taxation just as the land itself is exempted from state taxation. Therefore, any state inheritance tax on the transfer, to Indians, of any funds derived from tribal lands as well as any tax on the lands themselves is invalid.

A tribe can levy an inheritance tax on its members and non-member heirs.

MOTOR VEHICLE REGISTRATION

Presently, all motor vehicles operating in New Mexico are registered by the State Motor Vehicle Department which levies the fees.[82] No tribe has yet attempted to register vehicles operated by Indians and non-Indians on the reservation. Therefore, the questions of whether: two licenses would be required if a vehicle was to be operated both on and off the reservation; the manner of registration; regulation; etc., has not arisen. But, a tribe should be able to require a license for Indian

owned vehicles operated on the reservation.

CONCLUSION

Tribes and Indians living on a reservation are exempt from any form of state taxation except where allowed by Congressional action or tribal stipulation.

A tribe has the power to levy taxes on all within its borders, whether Indian or non-Indian. The state, in turn, can tax non-Indians within the reservation unless it would interfere with tribal self-government.

Most tribes in New Mexico, presently have a weak economic base. They are losing large amounts of revenue from purchases made off the reservations by Indians who end up paying state gross receipts taxes. Another important source of lost revenue is in the form of privilege and property taxes, most notably against non-Indians within the reservation. Developments as Cochiti, and Sangre de Cristo, allow a large amount of revenue to flow away from the tribe without tribal benefit.

There should be some attempts to draft tribal tax ordinances, weighing the merits and problems of taxing tribal members and/or non-members on the reservation. There should also be some important thought given to the approach of tax agreements with the state and whether they would actually be beneficial to both tribes and states.

This report has only touched the surface of many of the problems arising from taxation. Tribal exemption from state taxation is only a small part of the total picture. But, it is hoped that this general look at some of the problems facing the tribes and the state, and the

law as it relates to both, will provoke both political entities into arriving at some amenable means of dealing with a complex problem.

FOOTNOTES Part I

Introduction (p. 1):

1 "Friendly" litigation can be defined as litigation which is brought by mutual agreement of the parties for the purpose of gaining determination of a legal issue by a court.

Section I. (p. 2):

2 Iron Crow v. Oglala Sioux Tribe, 129 F.Supp. 15 (D.S. Dak. 1955). Barte v. Oglala Sioux Tribe, 259 F.2d.553 (8th Cir. 1956).

3 25 U.S.C. 261.

4 It must be recognized that most public services provided by the states on reservations are categorical programs largely supported by federal rather than state funds.

(p. 3):

5 Apache Tribe v. Jones, 411 U.S. 145, 36 L.Ed.2d 114, 93 S.C. 1267 (1973).

6 McClanahan v. Arizona Tax Commission, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.C. 1257 (1973).

7 Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.C. 269 (1959).

8 In ... situations (involving non-Indians on the reservation), both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The Williams test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected. McClanahan v. Arizona Tax Commission, supra note 6.

Section II. (p. 6)

9 Williams v. Lee, supra note 7; McClanahan v. Arizona Tax Commission, supra note 6.

10 New York exrel. Ray v. Martin, 326 U.S. 496, 90 L.Ed. 261, 66 S.C. 307 (1946); Draper v. United States, 164 U.S. 240, 41 L.Ed. 41 L.Ed. 419, 17 S.C. 107 (1896); Utah & Northern R. Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542, 6 S.C. 246 (1885).

11 The lack of a written constitution is not the sign of a "primitive" form of government. The American system acknowledges its debt to the legal system of England, which to this day does not have a written constitution.

(p. 9)

12 Norvell v. Sangre de Cristo Development Company, Inc., 372 F.Supp. 348 (1974), Appeal docketed, Nos. 74-1365, 74-1366, 74-1367, 10th Cir.

Section IV. (p. 13)

13 e.g., tax credits to encourage capital investment and the purchase of equipment by business, to encourage oil exploration, and to encourage stock ownership are common examples.

1. Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law, University of New Mexico Press, Albuquerque.
"...State laws are not applicable to tribal Indians or an Indian reservation where Congress had not expressly provided that state laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of express authority conferred upon the state by Congress." (254)

2. Worcester v. Georgia, 6 Pet. 515 (1832) and McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 36 L.Ed.2d. 129, 93 S.Ct. 1257 (1973). McClanahan pointed out that:
"...Mr. Chief Justice Marshall held that Indian nations were distinct political boundaries within which their authority is exclusive, and having a right to all lands within these boundaries...:"

3. Article XXI, Section 2, New Mexico Constitution:
"The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands laying within said boundaries owned or held by Indian tribes, the right to title to which shall have been acquired through the United States, or any prior sovereignty; and until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of United States."

   In McClanahan, supra note 2, the court came to the conclusion that:
"...the tax is resisted because the state is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the state has no more jurisdiction to reach income generated on reservation lands than to tax the land itself." (141)

4. Draper v. U.S., 164 U.S. 240 (1896); U.S. v. McBratney, 104 U.S. 62 (1881)

5. U.S. v. Kagama, 118 U.S. 375 (1886)

6. Agua Caliente v. County of Riverside, 442 F.2d. 1184 (1971)
Mescalero Apache Tribe v. Franklin Jones, 411 U.S. 145, 36 L.Ed.2d. 114, 93 S.Ct. 1267 (1963)

7. U.S. v. Rickert, 47 L.Ed. 532, 23 S.Ct. 478 (1903)

8. General Allotment Act, 24 Stat. L. 388

9. Article XXI, Sec. 2., New Mexico Constitution
McClanahan v. Arizona, supra note 2
Mescalero v. Jones, supra note 6
Hunt v. O'Chesky, 85 NM 388, 512 P.2d. 961 (1973)

10. McClanahan, 36 L.Ed.2d. at 135

11. NM GR Reg. 3 (F):9
The receipts of a federally licensed Indian trader from sales made to reservation Indians on the reservation are not subject to the gross receipts tax.
Sangre de Cristo Development Corp. v. City of Santa Fe, 84 NM 343, 503 P.2d. 323 (1972)

12. Handbook of Federal Indian Law, supra note 1
"As distinct political communities, the Indian tribes possess some of the attributes of tribal autonomy, among which is the power to legislate regarding their internal relations. This power, with certain exceptions, includes the power to levy local taxes on much of the property within tribal limits, belonging to members of the tribe." (885)

13. Buster v. Wright, 135 Fed. 947, 203 U.S. 599 (1906)
Authority of Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origin in an act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty.

The ultimate conclusion of the whole matter is that purchasers of lots in town sited in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise of non-citizens of the privilege of conducting business in those towns. 135 Fed. at 950-951

14. Morris v. Hitchcock, 194 U.S. 384 (1904)
While it is unquestioned that by the Constitution of the United States, Congress is vested with paramount power to regulate commerce with the Indian tribes, yet it is also doubted that in treaties entered into the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned...(392)

15. Iron Crow v. Oglala Sioux Tribe, 231 Fed.2d. 89 (1956)
We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux tribe to impose the tax or license in question has not been preempted by any federal statute or agency ruling but, to the contrary, has been implemented by the Indian Reorganization Act, supra, that such

power still exists.

16. 55 ID 14, 16, M-36448, M-Sept. 13, 1957, M-Oct 23, 1957

17. P.L. 83-280, 67 Stat. 588, 1953, 18 U.S.C. 1162, 28 U.S.C. 1360

18. Handbook of Federal Indian Law, supra note 1
Since...the exclusive power to regulate trade with the Indians is vested in the Commissioner of Indian Affairs, it would seem that, in the absence of specific Federal authorization, the tribe has no power to tax (Federally) licensed traders. (886)

19. Ibid.
The Supreme Court has repeatedly permitted the taxation by the State of the property of white persons located on Indian reservations on the theory that such taxation did not interfere with the exercise of federal authority within the reservation Thomas v. Gay, 196 U.S. 264 (1898); Wagoner v. Evans, 179 U.S. 588 (1898); Catholic Missions v. Missoula, 200 U.S. 118 (1906).

20. Utah and Northern Rail Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542 (1885), 543

21. Handbook of Federal Indian Law, supra note 1
To the extent that Indians and Indian property within an Indian reservation are not subject to state laws by reason of federal limitations, they also may not be subject to state tax laws. (845)

22. U.S. v. Rickert, supra note 7

23. Mescalero v. Franklin Jones, supra note 6
...in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands of Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Commission, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent Congressional consent. (119)

24. NMSA 51-17-1

25. U.S. v. Felipe Sandoval, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913)

26. Underlying this is the Act of March 3, 1905; 33 Stat. 1069.
...the lands now held by the various villages or pueblos of Pueblo Indians, by individual members thereof, within Pueblo reservations or lands, in the territory of New Mexico, ...shall be free and exempt from taxation of any sort whatsoever, including taxes hereafter levied, if any, until Congress shall otherwise provide.

27. NMSA 72-15A-1, et seq.

28. Hunt v. O'Chesky, supra note 9
We believe the tule announced in McClanahan, together with logical inference there from, is supportive of the action of the Court of Appeals, both with regard to taxation of income and gross receipts. Court of Appeals ruled that: ...State of New Mexico may not tax income and gross receipts of Indians residing on a reservation when the income and gross receipts involved are derived solely from activites within the reservation. (388)

29. See Appendix 2-A

30. Handbook of Federal Indian Law, at 307-369

31. Buck Act, 4 U.S.C. Sec. 104-109

32. NMSA 51-12-1

33. Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (1954)

34. U.S. v. Felipe Sandoval, supra note 25

35. Many pueblos have voted the acceptance of the IRA but have chosen not to organize under its provisions.

36. The Federal Government has also preempted the field in this instance, U.S. v. Candelaria, 271 U.S. 432, 46 S. Ct. 551, 70 L.Ed. 1023 (1926); U.S. v. Sandoval, supra note 25

37. Indian Reorganization Act, Sec. 17

38. White Mountain Apache Tribe v. Shelly, 480 P.2d. 654 (1971)

39. Mescalero v. Jones, supra note 6

40. 36 L.Ed.2d. at 124

41. 36 L.Ed.2d. at 125

42. NMSA 60-1-1 et seq.

43. NMSA 14-37-1 et seq.

44. McClanahan v. Arizona, supra note 2

45. Ibid

46. White Eagle v. Dorgan, 209 NW 2d. 621, 622 (1973)

47. Hunt v. O'Chesky, supra note 9

48. Regulations governing New Mexico Gross Receipts and Compensation Tax Act:
The gross receipts tax is a tax on the privilege of doing business in New Mexico and is not levied on the seller. It is not a sales tax, and therefore is not levied on the buyer...

49. Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed. 165 (1965)

50. NM GR Reg. 3 (f): 9 states that "the receipts of a federally licensed Indian trader from sales to reservation Indians on the reservation are not subject to gross receipts tax."
NOTE: Appendix 3-A

51. NM GR Reg. 3 (f):9

52. 58 ID 562, Stated:
"Where the purchases are made on Indian reservations, the Indians are exempt from payment of state sales taxes because Congress has given exclusive authority to the Commissioner of Indian Affairs to regulate trade with the Indians on Indian reservations."

53. Soldier v. Carlson, 350 F.Supp. 65 (1972), at page 66:
Revenue Department for the State of South Dakota has conceded... that the imposition of a state sales tax on an Indian retailer or purchaser on a South Dakota reservation is beyond its jurisdiction.

54. Mescalero v. Jones, supra note 6

55. See Appendix 4-A

56. NMSA 72-16A-12.2

57. Handbook of Federal Indian Law, supra note 1
Personalty owned by non-Indians but held on Indian reservations is subject to state taxation. (866)

58. National Bellas Hess v. Bureau of Revenue, 34 Ill. 2d. 164, 214 NE.2d. 755 (1966)

59. Pierce v. State Tax Commission, 29 AD 2d. 125, 286 NYS 2d. 162 (1968)

60. NMSA 72-18-1 et seq.

61. NMSA 72-19-1 to 72-19-25

62. 25 U.S.C. 398 c

63. Ibid
Taxes may be levied and collected by the state or local authority upon improvements, output of mines or oil and gas wells, or other rights of property, or assets of any lessee upon lands within executive order reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the treasury.

64. NMSA 72-19-4
Every interest owner shall be liable for this tax to the extent of his interest in the value of said products or to the extent of his interest as may be measured by the value of such products. Provided any tribe, Indian Pueblo or Indian shall be liable for this tax to the extent authorized or permitted by law.
Appendix 6-A

65. 58 ID 535

66. 67 Stat. 586; 18 U.S.C. 1161: 78 ID 39
The modification of federal Indian liquor laws permitting the introduction, possession, and sale of intoxicating beverages on the reservation with tribal consent does not make state... liquor laws applicable to...tribal or tribal members...reservation...this act requires that state liquor laws to be used as the standard of measurement to define lawful and unlawful activity on the reservation.

67. 18 U.S.C. 1161; 78 ID 39

68. NMSA 72-32-1, et seq.

69. NOTE; See Discussion on Compensation Tax

70. NMSA 72-14-4

71. NMSA 72-14-1, et seq.

72. Tonasket v. Washington, 411 U.S. 451, 93 S.Ct. 1941, 36 L. Ed. 2d. 385 (1973); McClanahan, supra note 2; Mescalero, supra note 6

73. NMSA 72-27-4

74. 49 Stat. 1521; 23 U.S.C. 55a

75. 72 Stat. 4 U.S.C. Sec. 104

76. 4 U.S.C. Sec. 104:
All taxes levied by any State, Territory or District of Columbia

upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies located on U.S. military or other reservations when such fuels are not for the exclusive use of the United States.
NOTE: Appendix 7-A

77. Bureau of Revenue, Ruling 69-110-2, September 29, 1969

78. 57 ID 129

79. Childers v. Beavers, 270 U.S. 555, 599

80. Oklahoma Tax Commission v. U.S., 87 L.Ed. 1612, 1621

81. 45 Stat. 495

82. NMSA 64-1-1 and following

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43 Stat. 244
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Act of March 3, 1927
44 Stat. 1347
25 U.S.C. 398 c

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Act of May 10, 1928
45 Stat. 495

Modification of Federal Indian Liquor Laws
Act of August 15, 1953
67 Stat. 586
18 U.S.C. 1161

Federal Government allowing States to tax certain federal areas.
"Buck Act"
4 U.S.C. 104

Definition of Indian Country
18 U.S.C. 1151

States assuming jurisdiction over tribes
25 U.S.C. 1322 (a)

Federal control of trade with Indians
U.S. Constitution Article I, Section 8, Clause 3

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57 ID 124

58 ID 562

63 ID 336

78 ID 39

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Pierce v. State Tax Commission, 29 A.D. 2d. 124, 286 NYS 2d 162 (1968)

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U.S. v. Pollman, 364 F. Supp. 995 (1973)

U.S. v. Rickert, 188 US 432; 47 L. Ed. 532; 23 S.Ct. 478 (1903)

U.S. v. Sandoval, 231 U.S. 28; 58 L. Ed. 107; 34 S.Ct. 1 (1913)

Utah and Northern Rail Co., v. Fisher, 116 U.S. 28; 29 L. Ed. 542; 6 S.Ct. 246 (1885)

Warren Trading Post v. Arizona Tax Commisssion, 380 US 685, 14 L. Ed. 2d. 165; 85 S.Ct. 1242 (1965)

* Reversed by
386 U.S. 753; 18 L. Ed. 2d 505; 87 S.Ct. 1389 (1967)
**Overturned by
#74-1365, 74-1366, 74 1367, 10th Cir., June 30, 1975

Wagoner v. Evan, 170 U.S. 588; 42 L. Ed. 1156; 18 S.Ct. 788 (1898)

White Eagle v. Dorgan, 209 NW 2d. 621 (1973)

White Mountain Apache Tribe v. Shelly, 107 Ariz 4; 480 P 2d. 654 (1971)

Williams v. Lee, 83 Ariz, 241; 319 P. 2d. 998; 358 U.S. 217; 79 S.Ct. 269, 3 L. Ed. 2d. 251 (1959)

Worcester v. Georgia, 6 Pet. 515; 31 U.S. 515; 8 L. Ed. 483 (1832)

Your Food Stores v. Espanola, 68 NM 327; 361 P. 2d. 950 (1961)

Sec. 2 (Control of unappropriated or Indian lands -- Taxation of federal government, nonresident, and Indian property.)

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any Act of Congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe.

Comparable Provisions.

Utah Const., art. III, Second.

Opinions of Attorney General.

1912-13, p. 26; 1915-16, pp.9, 41, 280; 1921-22, p. 115; 1931-32, p. 25; 1933-34, p. 139; 1935-36, p. 38; 1951-52, No. 5353; 1957-58, No. 58-213; 1965-66, No. 65-25.

Civil Jurisdiction.

This section did not deny a state court jurisdiction over a nonreservation Indian, sued on a promissory note, who was served with process on Taylor Grazing Act land, leased to such Indian by an agency of the United States. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49.

Civil jurisdiction over a suit on a promissory note against an Indian who does not live on a reservation is clearly a governmental and not a proprietary interest within meaning of this section. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49.

State court had jurisdiction over actions for personal injuries and wrongful death arising out of alleged tortious conduct of a non-Indian motorist committed against Indians on a state highway within territorial limits of Jicarilla-Apache Indian reservation. Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51.

Claimants of Indian Lands.

In a suit by the United States, as guardian of the Pueblo of Taos to quiet title to certain lands granted Pueblo Indians by the governments of Spain, Mexico, and the United States, such lands were not exempt from taxation so as to relieve claimants by adverse possession from proving: (a) adverse possession, (b) payment of all taxes on the lands claimed which were assessed and levied in conformity with the New Mexico laws. (Act June 7, 1924, 43 Stat. 636, ch. 331, § 4, 5.) United States v. Wooten, 40 F.2d 882.

Criminal Jurisdiction on Highway.

State did not have criminal jurisdiction over Navajo Indian while driving on U.S. highway within exterior boundaries of Navajo Reservation. State v. Begay, 63 N.M. 409, 320 P.2d 1017, modified by 68 N.M. 327, 361 P.2d 950, explained in 70 N.M. 196, 201, 372 P.2d 387 and 71 N.M. 418, 420, 379 P.2d 66.

Enabling Act.

This section is the same as § 2, part Second of the Enabling Act. Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838.

Governmental Power over Indians.

This compact added nothing to the authority and jurisdiction of the United States over Indian land as it existed under earlier congressional act. Martinez v. Martinez, 49 N.M. 83, 157 P.2d 484.

Under the terms upon which New Mexico was admitted to the Union and under this section, state cannot claim governmental power over the Indians or Indian lands, except where such jurisdiction has been specifically granted by Act of Congress, or sanctioned by decisions of the U.S. Supreme Court. Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950.

Military Housing Project.

A lessee's interest in a military housing project, situated on government land, is subject to taxation by the state. Kirtland Heights, Inc. v. Board of County Comrs. of Bernalillo County, 64 N.M. 179, 326 P.2d 672.

Navajo Indians.

Navajo Indian Reservation is not a completely separate entity existing outside the political and governmental jurisdiction of the state of New Mexico. Montoya v. Bolack, 70 N.M. 196, 372 P. 2d 387.

Pueblo Indians.

Pueblo Indian tribes possess inherent sovereignty except where it has been specifically taken from them by congressional action. Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950.

Since Pueblo Indians do not derive their governmental powers from the state of New Mexico, the federal district court for New Mexico is without jurisdiction to entertain a declaratory judgment action as to whether tribal government has deprived them of their religious liberty under the Civil Rights Act. Toledo v. Pueblo de Jemez, 119 F.Supp. 429.

Taxation.

Reservation to the state of power, though limited, to tax lands and property of Indians outside of reservations implies the consent of Congress to acquisition by reservation Indians of land and property outside of an Indian reservation. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145.

This clause does not prevent New Mexico from taxing the income of an Indian even though he lives and earns his living on a reservation. Ghahate v. Bureau of Revenue, 80 N.M. (App.) 98, 451 P.2d 1002.

Collateral References.

Indians 10, 12-14; Taxation 40 (4), 181, 215.

42 C. J. S. Indians §§ 19, 28, 29, 42, 44, 88; 84 C. J. S. Taxation §§ 27, 207, 212, 252, 258.

41 Am. Jur. 2d 845 et seq., Indians, § 23 et seq.; 51 Am. Jur. 250, 278, Taxation, §§ 188, 218.

Conditions: constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion. 4 A.L. R.2d 744.

Consent to state taxation of federal property or instrumentalities as affecting exemption thereof under provision of state Enabling Act, Constitution, or statute. 168 A.L.R. 547.

Estoppel to deny validity of lease by acquiescence in, or silence concerning, improvements by lessee. 76 A.L.R. 319.

Governmental and proprietary functions of states or its agency, distinction between, as affecting exemption from taxation. 155 A.L.R. 423.

Leasehold estate in public property as subject of tax. 23 A.L.R. 248.

Taxation of property owned by public body but not devoted to public or governmental use. 3 A.L.R. 1439; 23 A.L.R. 248; 101 A.L.R. 787; 129 A.L.R. 480.

OIL AND GAS SEVERANCE TAX ACT

NMSA (1953) 72-19-3. Purpose of act--Declaration of intention.--The purpose of this Oil and Gas Severance Tax Act (72-19-1 to 72-19-25) is to provide efficient administration and collection of a severance tax on oil, natural gas or liquid hydrocarbon.

It is the intent of the legislature that, upon the passage of this Oil and Gas Severance Tax Act into law, the provisions of the state general severance tax laws, being sections 72-18-1 through 72-18-28, inclusive, New Mexico Statutes Annotated, 1953 Compilation, and as amended, shall no longer apply to oil, natural gas or liquid hydrocarbon and the provisions of this Oil and Gas Severance Tax Act shall provide the only severance tax to be levied against oil, natural gas or liquid hydrocarbon and in the event of any conflict between the provisions of the state general severance tax laws and the provisions of this Oil and Gas Severance Tax Act, the provisions of this Oil and Gas Severance Tax Act shall govern in all cases, unless expressly repealed or amended.

Provided, however, that in the event of any conflict between the provisions of the state general severance tax laws and this Oil and Gas Severance Tax Act, the provisions of only one of these laws shall apply in levying a severance tax on oil, natural gas or liquid hydrocarbon.

History: Laws 1959, ch. 52, § 3.

Compiler's Note.

Section 72-18-28 referred to in the second paragraph was repealed by Laws 1959, ch. 52, § 29.

Opinion of Attorney General.

Property owned by a town or school district is exempt from the taxes imposed on the severance and sale of hydrocarbons. 1961-62, No. 61-64.

72-19-4. Oil and gas severance tax levied--Collected by commission --Rate--Interest owner's liability to state--Indian liability.--There is

levied and shall be collected by the commission a tax on all products which are severed and sold. The measure of the tax shall be two and one-half per cent (2½%) of taxable value of said products. Every interest owner shall be liable for this tax to the extent of his interest in the value of such products, or to the extent of his interest as may be measured by the value of such products. Provided, any Indian tribe, Indian pueblo or Indian shall be liable for this tax to the extent authorized or permitted by law.

History: Laws 1959, ch. 52, § 4.

Cross Reference.

Oil and gas accounting commission, 65-8-1 to 65-8-17.

Collateral References.

53 C. J. S. Licenses, §§ 47, 52.

72-19-5. Taxable value--Method of determining,--To determine the taxable value there shall be deducted from the value of products:

A. Royalties paid or due the United States or the state of New Mexico;

B. Royalties paid or due any Indian tribe, Indian pueblo or Indian that is a ward of the United States of America;

C. The reasonable expense of trucking any product from the production unit to the first place of market.

History: Laws 1959, ch. 52, § 5.

72-19-6. Value may be determined by commission--Standard.--The commission may determine the value of products severed from a production unit when:

A. The operator and purchaser are affiliated persons; or when

B. The sale and purchase of products is not an arm's length transaction; or when

C. Products are severed and removed from a production unit and a value as defined in this act (72-19-1 to 72-19-25) is not established for such products.

The value determined by the commission shall be commensurate with the actual price received for products of like quality, character and use which are severed in the same field or area.

History: Laws 1959, ch. 52, § 6.

72-19-7. Price increase subject to approval of agency of United States of America, state of New Mexico or court--Refund.--When an increase in the value of any product is subject to the approval of any agency of the United States of America or the state of New Mexico, or any court, the increased value shall be subject to this tax. In the event the increase in value is disapproved, either in whole or in part, then the amount of tax which has been paid on the disapproved part of the value shall be considered excess tax. Within one (1) year following the final determination of value, any person who has paid any such excess tax may apply for a refund, and the commission, upon proper finding, shall have the authority and duty to refund the amount of excess tax paid. Any refund may, at the discretion of the commission, be made in the form of credit against future tax payments.

History: Laws 1959, ch. 52, § 7.

72-19-8. Products on which tax has been levied--Regulation by commission.--This tax shall not be levied more than once on the same product. Reporting of products on which this tax has been paid shall be subject to the regulation of the commission.

G. R. REGULATION 3 (F):9 -- RECEIPTS OF FEDERALLY LICENSED INDIAN TRADERS --

The receipts of a federally licensed Indian trader from sales made to reservation Indians on the reservation are not subject to the Gross Receipts Tax. Warren Trading Post Company v. Arizona Tax Commission, 380 U.S. 685, 14 L.Ed.2d. 165, 85 S.Ct. 1242 (1965). Receipts of persons other than federally licensed Indian traders from sales made on the reservation are subject to the Gross Receipts Tax even though the purchaser is a reservation Indian. Receipts of federally licensed Indian traders from sales made to non-reservation Indians and to others from a location not within the reservation are subject to the Gross Receipts Tax. Not all land owned by Indian tribes and pueblos is located within an Indian reservation. The term Indian reservation, for purposes of this regulation, includes pueblo Indian grants. See G.R. Regulation 3 (F):32, p. 12.

72-16A-14.9. DEDUCTION -- GROSS RECEIPTS TAX -- SALES TO GOVERNMENTAL AGENCIES. -- Receipts from selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the United States or any agency or instrumentality thereof or the state of New Mexico or any political sub-division thereof may be deducted from gross receipts. Receipts from selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the governing body of any Indian tribe or Indian pueblo for use on Indian reservations or pueblo grants, may be deducted from gross receipts.

72-16A-12.2 EXEMPTION -- COMPENSATING TAX -- GOVERNMENTAL AGENCIES -- INDIANS. -- Exempted from the compensating tax is the use of property by the United States or any agency or instrumentality thereof or the state of New Mexico or any political subdivision thereof.

Exempted from the compensating tax is the use of property by the governing body of any Indian tribe or Indian pueblo on Indian reservations or pueblo grants.

G. R. REGULATION 3 (F):32 - CONSTRUCTION ON LEASED INDIAN LANDS--

Receipts from construction services as that term is defined in Section 72-16A-3 (C), and regulations thereunder, performed on Indian lands which have been leased to non-Indians are subject to the Gross Receipts Tax. See G. R. REGULATION 3 (F):9, p. 8.

G. Any regulation, ruling, instruction or order issued by the commissioner is presumed to be in proper implementation of the provisions of the revenue laws administered by the bureau.

H. The commissioner shall state the extent to which regulations, rulings and orders will have retroactive effect and, if no such statement is made, they will be applied prospectively only.

History: Laws 1965, ch. 248, § 1; 1970, ch. 25, § 1.

Title of Act.

An act relating to tax administration; and amending section 72-13-23 NMSA 1953 (being Laws 1965, Chapter 248, section 11) to reduce the time required for filing proposed regulations.--Laws 1970, ch. 25.

Amendments.

The 1970 amendment substituted "not less than two months" in the third sentence of subsection D for "three months"; and made minor changes in style in subsection B.

Cross-References.

State Rules Act, 71-6-23, 71-6-24, 71-7-1 to 71-7-3, 71-7-5 to 71-7-10.

Void Regulation.

Regulation which dishonors nontaxable transaction certificates acquired by taxpayer after commencement of audit by Bureau of Revenue exceeds Commissioner's interpretive authority in this section and is an attempt by regulation to impose a limitation on the deduction which the legislature did not prescribe; commissioner's authority to regulate possession of nontaxable transaction certificates does not extend to imposing a time requirement which would abridge or modify deduction authorized by section 72-16A-14.2. Rainbo Baking Co. of El Paso, Texas v. Commissioner of Revenue, 84 N.M. (App.) 303, 502 P.2d. 406.

72-13-24. Receipts -- Disbursements -- Distribution. -- A. All money received by the bureau shall be deposited with the state treasurer before the close of the next succeeding business day after receipt of the money

B. Money received or disbursed by the bureau shall be accounted

for by the commissioner as required by law or regulation of the director of the department of finance and administration.

C. Disbursements for tax credits, refunds and the payment of interest shall be made by the department of finance and administration upon request and certification of their appropriateness by the commissioner or his delegate. The state treasurer shall create a suspense fund for the purpose of making the disbursements authorized by the Tax Administration Act (72-13-13 to 72-13-92). All revenues collected pursuant to the provisions of sections 72-15-1 through 72-15-37 NMSA 1953, the Income Tax Act, the Withholding Tax Act (72-15-49 to 72-15-66), the Gross Receipts and Compensating Tax Act (72-16A-1 to 72-16A-19), the Resources Excise Tax Act (72-16A-20 to 72-16A-29) and the Liquor Excise Tax Act (72-32-1 to 72-32-11) shall be credited to this suspense fund and are appropriated for the purpose of making disbursements for tax credits, refunds and the payment of interest.

D. On the last day of each month, any money remaining in the suspense fund after the necessary disbursements have been made shall be identified by tax source and transferred from the suspense fund to the state general fund, except that before the remaining money is transferred to the general fund, an amount equal to one per cent (1%) of the taxable gross receipts reported for the month of deposit:

(1) for each municipality shall be distributed to each municipality; and

(2) by taxpayers who have business locations on an Indian reservation or pueblo grant in an area which is contiguous to a municipality and in which the municipality performs services pursuant to a contract

between the municipality and the Indian tribe or Indian pueblo shall be distributed to the municipality if:

(a) the contract describes the area in which the municipality is required to perform services and requires the municipality to perform services that are substantially the same as the services the municipality performs for itself; and

(b) the governing body of the municipality has submitted a copy of the contract to the commissioner of revenue.

E. Disbursements to cover expenditures of the bureau shall be made only upon approval of the commissioner or his delegate.

F. Miscellaneous receipts from charges made by the bureau to defray expenses pursuant to the provisions of sections 72-13-23 and 72-13-39 NMSA 1953 and similar charges are appropriated to the bureau for its use.

History: Laws 1965, ch. 248, § 12; 1966, ch. 53, § 1; 1969, ch. 147, § 1; 1970, ch. 57, § 1.

Compiler's Notes.

For repeal of the Emergency School Tax Act and the Compensating Tax Act of 1939, referred to in subd. C of this section, see Compiler's Notes under 72-13-14.

Title of Act.

An act relating to taxation; and amending sections 72-13-24 and 72-13-30.1 NMSA 1953 (being Laws 1965, chapter 248, section 12, and Laws 1969, chapter 145, section 1, as amended). -- Laws 1970, ch. 57.

Amendments.

The 1966 amendment deleted "(being Senate Bill 279 of the First Session of the Twenty-Seventh Legislature) if it is enacted into law, and" after "the Income Tax Act," inserted "the Gross Receipts and Compensating Tax Act, the Resources Excise Tax Act and the Liquor Excise Tax Act" following "the Compensating Tax Act of 1939" and made minor changes in phraseology and punctuation in subsection C.

The 1969 amendment substituted "Disbursements for tax credits, refunds and the payment of interest"

for "Refunds, including any interest allowable by section 69 of the Tax Administration Act" at the beginning of subsection C; substituted "The state treasurer shall create" for "The commissioner shall create with the state treasurer" in the second sentence of subsection C; deleted "the Emergency School Tax Act, the Compensating Tax Act of 1939" after "Withholding Tax Act" in the third sentence of subsection C; substituted "disbursements for tax credits, refunds and the payment of interest" for "refunds" at the end of subsection C; redesignated the former last sentence of subsection C as subsection D; added the language beginning with "except" in subsection D; redesignated former subsections D and E as subsections E and F; and made numerous changes in punctuation and phraseology.

The 1970 amendment inserted the designation for subdivision D (1); added subdivision D (2); and made minor changes in phraseology.

Ruling 69-110-2
September 29, 1969

Bureau of Revenue
Santa Fe, New Mexico

The excise tax imposed on the sale, use, or sale and use of motor fuel under Section 64-26-2, N.M.S.A. 1953 applies if motor fuel is sold to or used by an Indian tribe, an Indian residing on an Indian reservation, or a non-Indian residing on an Indian reservation. Section 64-26-2.1, N.M.S.A. 1953. However, this tax may be refunded in certain situations. Section 64-26-30, N.M.S.A. 1953 and Sections 62-26-31 through 62-26-38, N.M.S.A. 1953

Ruling No. 72-110-1
July 11, 1972

Bureau of Revenue
Santa Fe, New Mexico

Receipts from performing the service of "construction", as that term is defined in §72-16A-3(C), N.M.S.A. 1953 (Supp. 1971), for an Indian tribe or pueblo regardless of whether these services are performed inside or outside the boundaries of an Indian reservation or pueblo grant are subject to the gross receipts tax. These receipts are not deductible under §72-16A-14.9, N.M.S.A. 1953 (Supp. 1971).

The effective date of this ruling is July 1, 1969.

Ruling No. 73-110-1
August 21, 1973

Bureau of Revenue
Santa Fe, New Mexico

A ruling has been requested concerning the applicability of the New Mexico Withholding Tax Act to the following fact situation:

> X, a non-Indian, and Y, a corporation, are general contractors engaged in business in New Mexico. Both X and Y employ American Indians on construction projects which are located within the boundaries of the Navajo Indian reservation in the states of New Mexico and Arizona. Both X and Y withhold a portion of the wages of such employees for payment of income tax under the provisions of the Internal Revenue Code. X's and Y's employees include the following:
>
> Class 1: Enrolled Navajo Indians who live and work exclusively on the Navajo Reservation within the State of New Mexico;
>
> Class 2: Enrolled Navajo Indians who work exclusively on the Navajo Reservation within the State of New Mexico but who live on the Navajo Reservation within the State of Arizona;
>
> Class 3: Enrolled Navajo Indians who work exclusively on the Navajo Reservation within the State of Arizona but who live on the Navajo Reservation within the State of New Mexico;
>
> Class 4: Enrolled Navajo Indians who work exclusively on the Navajo Reservation within the State of New Mexico but who live off the Navajo Reservation in either the State of New Mexico or the State of Arizona;
>
> Class 5: Enrolled Navajo Indians who live on the Navajo Reservation within the State of New Mexico or Arizona but whose employment duties require them to work on a daily basis both on and off the Navajo Reservation but always within the boundaries of New Mexico, including some employees who are required to work in the so-called "checker-board" area;
>
> Class 6: Non-enrolled Indians with Navajo Indian consanguinity who live and work exclusively in the Navajo Reservation within the State of New Mexico;
>
> Class 7: Non-enrolled Indians with Navajo Indian consanguinity who work exclusively on the Navajo Reservation within

the State of New Mexico but who live on the Navajo Reservation within the State of Arizona;

Class 8: Non-enrolled Indians with Navajo Indian consanguinity who work exclusively on the Navajo Reservation within the State of Arizona but who live on the Navajo Reservation within the State of New Mexico;

Class 9: Non-enrolled Indians with Navajo Indian consanguinity who work exclusively on the Navajo Reservation within the State of New Mexico but who live off the Navajo Reservation in either the State of New Mexico or the State of Arizona;

Class 10: Non-enrolled Indians with Navajo Indian consanguinity who live on the Navajo Reservation within the State of New Mexico or the State of Arizona but whose employment duties require them to work both on and off the Navajo Reservation but always within the boundaries of New Mexico, including work within the so-called "checker-board" area;

Class 11: Non-Navajo Indians who are enrolled Indians with an Indian tribe other than the Navajos and who live and work exclusively on the Navajo Reservation within the State of New Mexico;

Class 12: Non-Navajo Indians who are enrolled Indians with an Indian tribe other than the Navajos and who work exclusively on the Navajo Reservation within the State of New Mexico but live on the Navajo Reservation within the State of Arizona;

Class 13: Non-Navajo Indians who are enrolled Indians with an Indian tribe other than the Navajos who work exclusively on the Navajo Reservation within the State of New Mexico but who live off the Navajo Reservation in either the State of New Mexico or the State of Arizona.

Class 14: Non-Navajo Indians who are enrolled Indians with an Indian tribe other than the Navajos who live on the Navajo Reservation within the State of New Mexico or the State of Arizona but whose employment duties require them to work both on and off the Navajo Reservation within the boundaries of the State of New Mexico; including work within the so-called "checker-board" area;

Class 15: Non-Navajo Indians who are enrolled Indians

with an Indian tribe other than the Navajos who live on the Navajo Reservation within the State of New Mexico but who work exclusively on the Navajo Reservation within the State of Arizona;

Class 16: Non-Navajo Indian employees with Indian ancestry but without any Navajo Indian consanguinity who are not enrolled members of any Indian tribe and who work exclusively and live on the Navajo Reservation within the State of New Mexico;

Class 17: Non-Navajo Indians who are not enrolled members of any Indian tribe and who work exclusively on the Navajo Reservation within the State of New Mexico but who live off the Navajo Reservation in either the State of New Mexico or the State of Arizona;

Class 18: Non-Navajo Indians who are not enrolled members of any Indian tribe who live on the Navajo Reservation within the State of New Mexico or the State of Arizona but whose employment duties require them to work both on and off the Navajo Reservation within the boundaries of the State of New Mexico, including the so-called "checker-board" area;

Class 19: Non-Navajo Indians who are not enrolled members of any Indian tribe and who work exclusively on the Navajo Reservation within the State of New Mexico but who live on the Navajo Reservation within the State of Arizona; and

Class 20: Non-Navajo Indians who are not enrolled members of any Indian tribe and who live on the Navajo Reservation within the State of New Mexico but who work exclusively on the Navajo Reservation within the State of Arizona.

X's and Y's on-reservation construction projects include the following:

(a) Construction contracts with the Navajo tribe in which financing is guaranteed by the federal government;

(b) Construction contracts with private parties, Indian and non-Indian;

(c) Construction contracts with a non-profit corporation owned by non-Indians, which "turnkeys" construction projects for the Navajo tribe; and

(d) Construction projects with the federal government.

X and Y are required to withhold an amount for New Mexico income tax, pursuant to §72-15-51, N.M.S.A. 1953, from the wages of employees in classes 4 through 20 who are otherwise subject to the New Mexico Income Tax Act (§72-15A-1, et seq., N.M.S.A. 1953 (Supp. 1971)). X and Y are not required to withhold from employees in classes 1 through 3, because these employees are Indians who reside and work upon an Indian reservation owned by an Indian tribe of which they are members, and such income, when wholly derived from reservation sources, is exempt from state income tax. McClanahan v. Arizona State Tax Commission, 41 U.S.L.W. 4457 (U.S. March 27, 1973). Hunt v. O'Cheskey, No. 931 N.M. Ct.App. (February 9, 1973), cert. quashed, No. 9705 N.M.S.Ct. (July 13, 1973). This is true notwithstanding the source of X's and Y's gross receipts, and notwithstanding that some of the Indian employees involved have to commute to and from work by way of highways and roads located off the Navajo Reservation within the states of New Mexico and Arizona. X and Y are not required to withhold New Mexico income tax from employees in class 5 for those portions of the employees' wages which are derived from employment on the reservation. McClanahan v. Arizona State Tax Commission, supra.